IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 595

SWIFT AND COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS, SWIFT AND COMPANY AND OMAHA PACKING COMPANY.

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January 21, 1942.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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(NOTE: In the following brief the abbreviation "R. p. __" refers to the pages of the printed transcript of record in this court. The exhibits which were presented in the hearings before the Commission, numbered 1 to 92, inclusive, were certified to this court separately and not as a part of the transcript of record. Throughout this brief they are referred to by the exhibit numbers which they received during the hearings before the Commission. The emphasis throughout the brief, as indicated by italics, is supplied by the writers.)

Opinions.

No opinion was filed by the District Court. That court filed findings of fact and conclusions of law, together with a final decree dismissing the complaint, entered June 4,

1941. The findings of fact, conclusions of law, and decree of the District Court appear at pp. 90-98 of the record.

This litigation was commenced by a complaint filed with the Interstate Commerce Commission (hereinafter called the Commission) on September 20, 1937. The decision of the Commission (dismissing the complaint) appears in the reports of the Commission as No. 27862, *Swift and Co. v. Alton R. Co.*, 238 I. C. C. 179, and is printed at pages 34-57 of the transcript of record in this court.

Appendix to Appellants' Brief.

We present herewith a separate volume entitled "Appendix to Appellants' Brief". This appendix has been prepared in order that the brief itself may be kept within reasonable limits.

In addition to the statutes cited, there are, for convenience, included in the appendix certain decisions of the Commission to which we desire to call attention, abstracts of parts of the record, certain exhibits which have been separately certified, and other matters which may be conveniently presented in the appendix. The appendix is intended as a ready source of verification of statements which may appear in summary form in this brief. It need not be consulted except for that purpose.

The Question to Be Decided.

May appellants lawfully demand the right to take possession of their direct shipments of live stock at the unloading pens of the railroads' only live stock terminal in Chicago and have egress thence immediately to a public street, upon payment to the railroads of their published transportation rates (*or such rates plus a reasonable fee for egress*) without the payment of additional charges, known as yardage charges, assessed by the railroad defendants' agent, The Union Stock Yard and Transit Company of Chicago, for a complete stock yard service (not a transportation

service) furnished under the provisions of the *Packers and Stockyards Act, 1921*?

The Commission has denied its jurisdiction to decide whether the yardage fee (covering a complete stock yard service) is a reasonable charge for mere egress. (Commission's decision, R. p. 55, second sentence, third paragraph.)

The Egress Sought by Appellants Would Not Impose Any Additional Costs Upon the Railroad Defendants.

The prayer of the complaint was in substance amended at the hearing before the Commission. Throughout the hearing before the Commission appellants expressed their willingness to pay whatever the Commission might consider reasonable for egress, in addition to the line haul rate to the unloading pens, if in fact additional expense should be incurred by the railroads by reason of any payment to their agent, the stock yard company, for use of its alleys for a short distance from the railroad unloading pens to public streets, alleys, or ways.

It is true that in the complaint reparation was asked upon past shipments. That question was not decided by the Commission in view of its disclaimer of jurisdiction and is not before the court on this appeal. That would be a matter for the Commission to decide in the event that the case is remanded for further consideration. The Commission has power to establish a reasonable rate, regulation, or practice for the future without awarding reparation for the past. *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. ed. 1055.

The Statutes Involved.

The statutes involved are certain sections of part I of the *Interstate Commerce Act*. They appear in full at pages 1-5 of the appendix to this brief.

The statutes establishing the jurisdiction of the District Court and of this court on appeal are Title 28 U. S. C. A.

(Judicial Code) section 41, subdivisions 27 and 28, and sections 43, 44, 45, 45a, 46, 47, 47a, and 48, printed in full at pages 6-12 of the appendix to this brief.

Specification of Assigned Errors Intended to Be Urged.

Appellants intend to urge each of the assigned errors. While they are numerous, in order to permit statement with the particularity required by rule 9, they fall into certain well defined groups as to which the assignments are either as to error of the District Court in failing to make certain findings or error in the findings made. They are combined under our statement of points relied upon (R. p. 787).

Statement of the Case.

This is a suit by appellants, Swift and Company and Omaha Packing Company, against the United States and the Commission for the purpose of suspending, enjoining, setting aside, and annulling certain report and order of the Commission in No. 27862, *Swift and Co.* v. *Alton R. Co.*, 238 I. C. C. 179, which appears at pages 34-57 of the record in this court. Armour and Company intervened before the Commission (but without seeking relief) and in the District Court and has joined in this appeal.

The principal contention is that the Commission and the District Court made fundamental errors in their construction of the law. We have, however, printed the transcript of the evidence before the Commission because in a few instances the Commission has failed to state adequately the facts of record; or has failed to make findings with respect to material facts upon which evidence was introduced.

THE RELIEF SOUGHT.

The prayer is not for a final adjudication of the rights of the parties, but remand of the complaint to the Commission for exercise of the jurisdiction which the Commission

has disclaimed. The relief sought is that indicated by this court in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 83 L. ed. 1147, where the court said (at page 136):

> "* * * if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles."

THE COMPLAINT BEFORE THE COMMISSION.

In September, 1937 appellants filed with the Commission a complaint (R. pp. 24-34), in which it was alleged in substance that by tariff publication, and by long usage and custom, the railroad defendants had constituted the Union Stock Yards, Chicago, Ill., as their terminal for the receipt and delivery of live stock in Chicago; that the railroad defendants denied to appellants, contrary to law and to specific provisions of the *Interstate Commerce Act*, the right to obtain from said railroad defendants, at reasonably convenient, safe, and suitable pens, ways, and alleys, possession of direct shipments of live stock consigned to appellants at said live stock terminal of the railroad defendants at the Union Stock Yards, Chicago; and denied to appellants egress for immediate removal of such live stock from the unloading pens of said railroad defendants, on the property of their agent, The Union Stock Yard and Transit Company of Chicago (the railroad defendants' only live stock terminal in Chicago) *to the nearest public street via the shortest or most convenient way, to be designated by the railroad defendants*, without the payment to the railroad defendants' agent, The Union Stock Yard and Transit Company of Chicago, of yardage charges for stock yard services not necessary to a delivery of live stock, in excess of and in addition to the lawful published tariff rates of said railroad defendants to their un-

loading pens upon the property of their agent, The Union Stock Yard and Transit Company of Chicago.

The prayer of the complaint was in substance that the Commission require the railroad defendants to establish rules and regulations under which appellants might obtain possession of their direct shipments of live stock from the railroad defendants at their unloading pens at the Union Stock Yards, Chicago, and be permitted immediate egress from said unloading pens of the railroad defendants solely for the purpose of removal of said live stock from said unloading pens of said railroad defendants to the nearest public street, *via the shortest or most convenient way, to be designated by the railroad defendants*, without payment of yardage charges for stock yard services neither desired, requested, nor necessary in connection with the delivery to appellants of live stock by the railroad defendants.

The complaint was dismissed by the Commission. Thereafter appellants filed a petition for reconsideration which was denied by the Commission on July 8, 1940 (R. p. 57).

THE COMPLAINT IN THE DISTRICT COURT.

Thereafter, on October 7, 1940, appellants filed in the United States District Court for the Eastern Division of Illinois, Northern District, a complaint in which it was alleged that the decision of the Commission should be enjoined, set aside, and annulled because of alleged errors of law and fact in the Commission's decision (R. pp. 1-24).

After hearing, on June 4, 1941 the District Court entered its findings of fact and conclusions of law holding in substance that the findings made by the Commission were adequate to support its conclusion that the transportation of direct shipments of live stock is completed when the live stock is placed in the railroad defendants' unloading pens at the Union Stock Yards and that the charges assessed by railroad defendant's agent, The Union Stock

Yard and Transit Company of Chicago, for stock yard services in order to obtain egress, are not subject to the jurisdiction of the Commission (R, pp. 90-97). A decree dismissing the complaint before the District Court accompanied the findings of fact and conclusions of law.

Summary of Principal Facts.

The points upon which appellants rely are argued at length under appropriate captions in the following portions of this brief. The following summary is intended as a preliminary exposition of the factual situation.

THE TYPE OF SHIPMENTS INVOLVED.

1. The case concerns only what are known as *direct* shipments of live stock consigned to appellants at the Union Stock Yards, Chicago, Ill., as a destination.

Direct shipments are defined as shipments as to which appellants are shown as the consignors in the bills of lading issued by the railroads at the points of origin, and as consignees of the shipments at Union Stock Yards, Chicago, Ill. (R. p. 157).

Direct shipments consist of live stock purchased by appellants at points other than Chicago for immediate slaughter in their packing plants adjacent to the Union Stock Yards in Chicago. No stock yard service (yardage) is desired by appellants. Appellants desire to take immediate possession of such live stock at the railroad defendants' unloading pens and have the right of immediate egress to a public street over a route to be designated by the railroad defendants. *Direct* shipments are not consigned to commission merchants at the Chicago yards for the purpose of having the stock yards furnish stock yard services customary in connection with the sale of live stock for the shipper. The term "*direct* shipments" has grown up to distinguish the class of shipments as to

which appellants or others are both consignors and consignees from shipments by live stock producers consigned to commission men at the stock yards for sale (R. pp. 159-161).

THE RAILROAD DEFENDANTS HAVE MADE THE STOCK YARDS THEIR OWN TERMINAL STATION.

2. The railroad defendants have, by their published tariffs and by failure to provide any other live stock terminal, constituted the Union Stock Yards their own terminal for the delivery of live stock in Chicago (R. pp. 182-186, and decisions of courts and Commission hereafter cited). The road engines and crews of the railroad defendants haul the live stock directly to their unloading chutes and pens at the Union Stock Yards (R. p. 182).

These unloading facilities are in effect rented by the railroads from the stock yard company. The railroad tariffs name the Union Stock Yards as their station for the delivery of live stock. The stock yard company, *as a common carrier by railroad*, publishes and files with the Commission a tariff naming a charge of $1.25 per single deck and $1.50 per double deck car for the service of unloading live stock from the cars. The tariff provides that this charge is made "as carrier's agent". The tariffs of the railroad defendants provide for payment of these charges of the stock yard company. In substance, the railroad defendants lease the facilities of the stock yard company for use as their own live stock terminal (R. pp. 180, 181).

RAILROADS HAVE PROVIDED NO MEANS OF EGRESS FROM THEIR LIVE STOCK DELIVERY TERMINAL.

3. The railroad defendants have provided no means of egress from their unloading pens, or means of access thereto, by which appellants can take possession of the live

stock upon unloading from the car and move it immediately to any public or private street or alley. After unloading from the car by the railroad defendants upon their own leased terminal, appellants can obtain their live stock only upon payment of certain yardage charges for *stock yard* (not transportation) services. At the time of the hearing before the Commission the yardage charges amounted to 45 cents per head on cattle, 35 cents on calves, 15 cents on hogs, and 10 cents on sheep (R. pp. 181, 182). These charges average $11.25 per car of cattle, $25.20 per car of calves, $13.50 per car of hogs, and $23.30 per car of sheep (R. p. 236). These charges are not published as transportation charges in any tariff filed with the Commission. They are published only by The Union Stock Yard and Transit Company of Chicago in a tariff filed with the Secretary of Agriculture in accordance with the *Packers and Stockyards Act, 1921,* and cover all stock yard services as defined in that act.

These services include (1) feeding of the live stock in proper pens; (2) watering the live stock in proper pens; (3) holding the live stock in holding pens; (4) moving the live stock to pens assigned to commission men; (5) furnishing to the commission men pens in which the live stock may be held for an unlimited time; (6) movement of the live stock after sale to pens of a purchaser or to outbound cars; and (7) weighing the live stock for the purpose of purchase and sale (R. pp. 160-175). Appellants desire none of these services but must pay for all of them in order to obtain possession of their live stock.

STOCK YARD COMPANY HAS DUAL FUNCTION.

4. The Union Stock Yard and Transit Company functions in a dual capacity. This is so found by the Commission at pages 181-182 of its decision (R. pp. 37, 38), where it is stated:

> "The Yard Company, with respect to part of its business, is a common carrier of freight by hire, is

engaged in interstate commerce, and is subject to the Interstate Commerce Act.[1] It is also a stockyard owner as that term is defined in the Packers and Stockyards Act.[2] As such, it is engaged in operating a public stockyard. In the operation of its business as a stockyard owner, it is subject to the jurisdiction of and regulation by the Secretary of Agriculture."

Acting in its capacity as a common carrier by railroad, the Union Stock Yard and Transit Company, by its tariff, states that it performs its services "as carrier's agent" (R. p. 181).

Alleged Errors in the Decision of the Commission.

A summary of the argument at this point would necessarily be a duplication of the detailed argument that follows. The fundamental error of the Commission is the following:

The Commission holds in substance that section 15 (5) of the *Interstate Commerce Act* has superseded, as to deliveries of live stock at public stock yards, the provisions of section 1 (3); that the railroads need not make a personal delivery at a public stock yards to a consignee and afford egress to the streets; that the Commission is without jurisdiction in the premises; and that the Secretary of Agriculture has jurisdiction.

This construction of the law necessarily applies not only to Chicago but to all public stock yards throughout the United States.

Indeed it may be said that this is a test case. In the documents transmitted to this court and marked exhibit "B" it is indicated that there is now pending before

1. *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; *Livestock Loading and Unloading Charges*, 52 I. C. C. 209; *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330; *Cancelation of Livestock Services at Chicago*, 227 I. C. C. 716; *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213.

2. Sections 201 to 229 of the Packers and Stockyards Act, title 7, U. S. C. A.

the Commission and undecided a proceeding known on its docket as No. 28400, *Delivery of Livestock Shipments at Cleveland, Ohio.* Appellant Swift and Company is a party to that proceeding, having a packing house adjacent to the Cleveland Union Stock Yards where it now obtains egress without extra charge. Upon authority of the decision in the present case, the railroads are seeking permission of the Commission to withdraw at Cleveland the egress which is now provided.

Since the date when this case was decided (April 8, 1940) the Commission has announced its decision in *Status of Public Stockyard Companies*, 245 I. C. C. 241 (April 7, 1941). The Commission there points out that at several eastern stock yards the railroads pay the stock yard company certain charges for effecting delivery and egress, the payment at Jersey City being $2.75 per car. (See appendix to brief, pp. 97, 98.)

The decision of the Commission applies a new rule of law to deliveries of live stock at public stock yards throughout the entire United States. It is therefore of public importance that the decision, being of nation-wide application, be either affirmed or corrected by this court.

ARGUMENT OF POINTS RELIED UPON.

I.

The District Court Erred in Failing to Find That Section 15 (5) of the Interstate Commerce Act Did Not Supersede or Modify the Provisions of Section 1 (3) of Said Act with Respect to the Delivery of Live Stock at Public Stock Yards; That the Legislative History of Section 15 (5) of the Interstate Commerce Act Does Not Support the Conclusion of the Commission to the Effect That Section 15 (5) Was Intended to Supersede or Modify Section 1 (3) of the Interstate Commerce Act or the Law of the Covington Case as to Unloading and Delivery of Live Stock by Railroad Common Carriers at Public Stock Yards; and That the Interstate Transportation of Live Stock to the Railroad Defendants' Station at the Union Stock Yards in Chicago Does Not End Until After Unloading for Delivery or Tender to the Consignee at Said Destination, as Specified in Assignments of Error Nos. 9, 10, 11, and 12.

THE FUNDAMENTAL ERROR OF THE COMMISSION IS ITS FINDING THAT, AS TO LIVE STOCK, SECTION 15 (5) REPEALED SECTION 1 (3) OF THE INTERSTATE COMMERCE ACT.

In the present case the Commission held (contrary to its own prior decisions and the decisions of this and other federal courts) that section 15 (5) of the *Interstate Commerce Act* (enacted in 1920) repealed (as to delivery of live stock at public stockyards) the provisions of section 1 (3) which have existed in their present form since 1906. These sections of the *Interstate Commerce Act* appear at pages 1 and 5 of the appendix to this brief under "Statutes Cited". Appellants requested a specific conclusion of law upon this point by the District Court (R. pp. 80-81), but none was made.

The definition of "transportation" in section 1 (3), and

section 15 (5), are, for convenience, here stated in the footnote.

The Commission holds that the statutory definition of "transportation" in section 1 (3) no longer applies to the carriage of live stock to a public stock yard which has been made the terminal of the line haul railroads for the delivery of live stock. The Commission holds that as to all traffic, other than live stock destined to a public stock yard, the railroad must effect a delivery to the consignee under the definition of "transportation" in section 1 (3); but that section 15 (5) permits a railroad to deliver live stock at a public stock yard, adopted and maintained as the railroad's only live stock terminal, in such manner that the consignee must pay for a complete stock yard service under the *Packers and Stockyards Act, 1921* (U. S. C. A. Tit. 7), in order to obtain possession of live stock, although the shipper seeks no stock yard service, but only a mere egress from the unloading pens to a public street. The Commission says:

> "Emphasis is placed by complainant on the provisions of the act which define 'transportation' and to the inclusion in that term of the word 'delivery,' and it is contended that our jurisdiction is co-extensive with transportation as defined in section 1 (3) of the

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SEC. 1(3) "* * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and *all services in connection with the* receipt, *delivery*, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

SEC. 15(5). "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards."

act, including all services in connection with the delivery of livestock. Decisions are cited which hold, in effect, that property shipped remains in transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station. This is true of traffic generally, but transportation of livestock to public stockyards and the delivery embraced therein is provided for in a particular section of the act.

"The provision of the act which differentiates between livestock and other carload freight with respect to the unloading service is the amendment made in 1920 to section 15 embodied in paragraph 5 of that section." (p. 191.)

"The language of section 15 (5) specifies the services to be included in the transportation to public stockyards, and it clearly states that it shall include delivery into suitable pens. That does not mean delivery to a public street, delivery to a plant connected by a runway, or viaduct with the stockyards, or delivery to a private way which may lead from the stockyards proper. It means delivery into pens on the stockyards' property which are suitable to receive the stock in a safe manner. Had Congress intended to require delivery of the stock beyond the boundary of the public stockyards, it would have so stated." (pp. 195-196.)

To borrow the words of Mr. Justice Frankfurter, this construction of the law represents merely "a difference of views within the Commission".*

THE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS ESTABLISH THE PROPOSITION THAT SECTION 15 (5) DID NOT MODIFY THE DUTY OF THE RAILROAD TO MAKE DELIVERY AS A PART OF TRANSPORTATION AS DEFINED IN SECTION 1 (3).

We hope to satisfy this court that the interstate transportation of live stock to the railroad defendants' station at the Chicago Union Stock Yards does not end until after

* *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 83 L. ed. 1147.

unloading for delivery or tender to the consignee by the railroad at that destination. Such was the doctrine of this court at common law, and this court has construed that rule as being adopted by the specific words of the *Interstate Commerce Act* both before and since the enactment of section 15 (5).

DECISION OF COMMISSION IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

Consideration of this question commences with the decision in *Covington Stock Yard Co.* v. *Keith*, 139 U. S. 128, 35 L. ed. 73 (decided in 1891). This decision was prior to the enactment of the *Interstate Commerce Act* in its present form. Although always treated by this court as one of the leading cases, it is not mentioned in the decision of the Commission.

In the *Covington case*, this court said (pp. 135-136):

"A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, *it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees.* The *transportation* of live stock begins with their delivery to the carrier to be loaded upon its cars, and *ends only* after the stock is unloaded and *delivered*, or offered to be delivered, *to the consignee*, if to be found, at such place as admits of their being safely taken into possession."

The doctrine of the *Covington* decision was affirmed after the passage of the *Interstate Commerce Act* in *United States* v. *Union Stock Yard & T. Co.*, 226 U. S. 286, 57 L. ed. 226 (decided in 1912), where the court said (p. 304):

> "'The transportation of live stock,' said this court in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461, in treating of the duties of common carriers, irrespective of the act to regulate commerce, 'begins with their delivery to the carrier to be loaded upon its cars, and *ends* only after the stock is unloaded and delivered, or offered to be delivered, to the consignee.'"

This decision dealt with deliveries at the Union Stock Yards in Chicago.

The next case in which this question came before this court was *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382 (decided in 1935). This decision also dealt with deliveries at the Chicago Union Stock Yards. The court there set aside the order of the Commission in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, holding that the railroad carrier was not required to furnish facilities such as alleys, overhead viaducts, and a tunnel under 39th Street to the Hygrade plant. The court further said (p. 201):

> "Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways."

The decision in the *Atchison case* was clarified and the doctrine of the *Covington case* reaffirmed in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198 (decided 1939).

The court there said (pp. 218-219):

> "'Section 1 (1) of the Interstate Commerce Act (49 U. S. C. A. § 1(1)) declares: 'The provisions of this act shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad, * * *.' Section 1 (3) (49 U. S. C. A. § 1(3)) provides that the term railroad shall include '* * * all

the road in use by any common carrier operating a railroad * * * all switches, spurs, tracks, *terminals and terminal facilities of every kind* used or necessary in the transportation * * * of * * * persons or property * * * including all freight depots, yards, or grounds, used or necessary in the transportation or delivery of any such property.' It defines the term 'transportation' as including 'locomotives, cars, * * * and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, * * * and handling of property transported.' Section 15(5) (49 U. S. C. A., § 15(5)) provides, 'Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner. * * *'

"Without the aid of these statutes the *transportation* of livestock by rail *was held* to begin with its delivery to the carrier for loading onto its cars, and to *end* only after unloading for *delivery* or *tender* to the consignee at the place of destination. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 136, 35 L. ed. 73, 76, 11 S. Ct. 461. *The same rule has been repeatedly applied since the statute was adopted. Erie R. Co.* v. *Shuart*, 250 U. S. 465, 468, 63 L. ed. 1088, 1090, 39 S. Ct. 519; *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 198, 79 L. ed. 1382, 1387, 55 S. Ct. 748, and cases cited. *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 82 L. ed. 1469, 58 S. Ct. 990; 2 Hutchinson, Carriers, 3d ed. § 510."

* * * * * *

"That appellant's stockyard *is a terminal of the line-haul carriers*, and that it performs their railroad terminal services within the meaning of the Act was recognized in *Adams* v. *Mills*, *supra* (286 U. S. 409, 76 L. ed. 1192, 52 S. Ct. 589) and also in *Atchison, T. &*

S. F. R. Co. v. United States, 295 U. S. 193, 79 L. ed. 1382, 55 S. Ct. 748, *supra*. There the Commission's order directing the discontinuance of appellant's yardage charge to consignee was set aside on the *sole* ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish."

Attention is called to the statement by the court that the Commission's order in *Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, was set aside *solely* because the Commission failed to make appropriate findings of fact as to the duty of the railroad defendants to make delivery.

It is also to be noted that this court cites the decisions in the *Atchison case* and the *Denver case* in support of the doctrine of the *Covington case*, while the Commission cites the same decisions as reversing the doctrine of the *Covington case* (Commission's decision, pp. 189-191, R. p. 53).

In this summary of decisions of this court we do not overlook *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, decided February 3, 1941. The court was there dealing solely with the question whether the Armour complaint presented issues which required preliminary administrative action by the Commission and carefully refrained from passing upon the merits of the controversy. But the court did hold directly contrary to the Commission's decision as to the Commission's jurisdiction.

The doctrine of the *Covington case* was followed by the United States Court of Appeals for the District of Columbia in *United States v. Interstate Commerce Commission*, 73 F. (2d) 948, decided in 1934. The court there said (p. 951):

"Undoubtedly, as was said in *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 11 S. Ct. 461, 35 L. ed. 73, a carrier of live stock has no more right to

make a special charge for delivering the stock in and through stock yards provided by itself, *or provided by another corporation,* than a passenger carrier has to make a special charge against a passenger for the use of its passenger depot. The *duty of the carrier* begins with the delivery of the stock to the carrier to be loaded on its cars, and *ends only* after the stock is unloaded and *delivered* or offered to be delivered to the consignee, and the precise terms of the statute (section 15 (5)) impose upon it the obligation to place the stock in suitable pens without extra charge to the consignee."

The most recent construction placed by a United States Circuit Court of Appeals upon the question here involved is the decision of that court for the seventh circuit on April 4, 1940, in *Armour & Co.* v. *Alton R. Co.,* 111 F. (2d) 913, from which the following is quoted (pp. 915-916):

"(1, 2) Thus it came to pass that these yards—providing such facilities as loading and unloading platforms, chutes and alleys, unloading and holding pens, and other livestock conveniences—became the common livestock depot of the defendant carriers. The Yards Company in supplying its yards, performs there the transportation services which the carriers are under a duty to render. Serving in this capacity *it is the agent of the carriers* and a common carrier subject to the Interstate Commerce Act. 24 Stat. 379, as amended in 1920, 41 Stat. 474, 49 U. S. C. Secs. 1-27, 49 U. S. C. A. §§ 1-27; *United States* v. *Union Stock Yard & Transit Co.,* 226 U. S. 286, 33 S. Ct. 83, 57 L. ed. 226; *Union Stock Yard & Transit Co.* v. *United States,* 308 U. S. 213, 60 S. Ct. 193, 84 L. ed. 198. That it is proper for the carriers to discharge their duty to deliver at the place of destination, in this way, is clear. *Merchants' Warehouse Co.* v. *United States,* 283 U. S. 501, 506, 51 S. Ct. 505, 75 L. ed. 1227."

"(5) In passing we add that the *transportation* of livestock by rail begins with its delivery to the carrier for loading at point of origin, and *ends after* unloading for *delivery* or tender to the consignee at the place of destination. This was the rule at the com-

mon law. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 136, 11 S. Ct. 461, 35 L. ed. 73. *'It is the rule under the Interstate Commerce Act.* See *Union Stock Yard & Transit Co.* v. *United States, supra. No magic is needed to compel the thought that the mere privilege of immediate removal from the unloading pens, a mere way out to the public highways, is incidental to and part of the delivery. Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 295 U. S. 193, 201, 55 S. Ct. 748, 79 L. ed. 1382; See also dissent therein, 295 U. S. at page 203, 55 S. Ct. at page 753, 79 L. ed. 1382.''

We also call attention to the construction placed upon *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382, in the footnote on page 916 of said decision of the Circuit Court of Appeals for the seventh circuit, reading as follows:

"However, the Commission's order directing discontinuance of the yardage fee in instances where delivery was taken at the unloading pens, was set aside. *Hygrade case, supra*, 295 U. S. 193, 55 S. Ct. 748, 79 L. ed. 1382. The Court was impressed by the consignee's constant use of certain property of the Yards Company namely, 'A route via the overhead runway to the Hygrade plant,' and concluded that there was no evidence that in removing the animals from the unloading pens, *the consignee used only an egress to the city streets.* However, the Court recognized that 'Plainly there is an essential difference between the route from the unloading pens to consignee's plant and a mere way out to the public highways.'

"In this connection, it is material to quote briefly: 'The Hygrade Company did not seek and the Commission did not grant relief upon the ground that the carriers failed to provide egress from the unloading pens in the public stockyards (at Chicago) to the city streets by means of which consignee's animals might be removed to its plant. * * * Consignee * * * sought free use of the Yards Company's properties, including the overhead runway * * *.' *Atchison Ry. case, supra*, 295 U. S. at page 200, 55 S. Ct. at

page 752, 79 L. ed. 1382. It is to be noted that in the instant case plaintiff has borne these words in mind.

"In a recent opinion the Supreme Court said of the Atchison or Hygrade decision that 'There the Commission's order • • • was set aside on the sole ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish.' *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213, 60 S. Ct. 193, 196, 84 L. ed. 198."

The point to be noted is that the courts have repeatedly held (this court as late as 1939 and the Circuit Court of Appeals for the Seventh Circuit in 1940) (1) that the passage of section 15(5) did not affect the rule of the *Covington* case; and (2) that *transportation* of live stock *ends* only after unloading for delivery or tender to the consignee, while the Commission specifically finds that the transportation ends "when the live stock has been unloaded into the unloading pens at the Union Stock Yards"; that is to say, before it is delivered or offered to be delivered to the consignee.

PRESENT DECISION IN CONFLICT WITH COMMISSION'S PRIOR DECISIONS.

The Commission has followed the same construction of the law in all cases except the present one.

The earliest case before the Commission was *Keith* v. *Kentucky Central R. R. Co.*, 1 I. C. C. 601 (decided in 1887, before the enactment of section 15(5)) in which the Commission said (p. 603):

"As common carriers of live stock it is the legal duty of the defendants to provide reasonable and proper facilities for receiving on board, and for discharging from their cars, all live stock offered for shipment or brought over their respective roads and their connections to or from the City of Covington,

> Kentucky, free of charges other than the usual transportation charges. It is not believed that this legal duty and obligation of defendants is fully discharged by receiving on, and discharging from, their cars live stock at a depot, *access to which must be purchased.*"

The next decision of the Commission which involved this question was *Southwestern Horse & Mule Asso.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730. That case did not involve a request for a mere egress from the unloading platforms but, as shown in the decision, the shippers were there requesting a complete stock yards service in addition to transportation (see p. 84, appendix to this brief).

In the next case before the Commission (*Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641) its construction of the law is in exact accordance with that sought here by appellants. The Buffalo Stock Yards (where live stock was delivered by the New York Central Railroad), was and is a public stock yards which files its stock yards tariff with the Secretary of Agriculture. It has recently been required to file with the Commission a tariff of its charges for loading and unloading live stock. *Status of Public Stockyards Companies*, 245 I. C. C. 241.

Because the *Allied Packers decision* contains such a full exposition by the Commission of the point here under discussion, we have included the entire decision at pages 13-23 of the appendix to this brief. Suffice it to say at this point that, after describing the origin of section 15 (5) of the *Interstate Commerce Act*, the Commission held as follows (pp. 643, 644, 646, 647, appearing in the appendix to the brief at pages 16, 17, 20, 22):

> "Under section 1 (1), the interstate commerce act applies to common carriers engaged in the transportation of passengers or property by railroad. Paragraph (3) of the same section defines the term 'railroad' as including all terminals and terminal facil-

ities of every kind used or necessary in the transportation of the persons or property designated, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' is defined as including all instrumentalities and facilities of shipment or carriage and all services in connection with the receipt, delivery, storage, and handling of property transported."

* * * * *

"The undertaking of the carrier to transport goods necessarily includes the duty of delivering them to the consignee entitled to their possession. *North Penn. Railroad* v. *Commercial B'k*, 123 U. S. 727. A carrier does not fulfill this obligation to deliver by merely providing a place where goods may be taken out of a car, but it must also provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property. *Covington Stock-Yards* v. *Keith*, 139 U. S. 128; *Norfolk Ry.* v. *Public Serv. Comm.*, 265 U. S. 70. This service inheres in every transportation.

"With the foregoing statements of the carrier's duties in mind, the conclusion seems inevitable that the *stockyards* when used to perform the service described *were terminal facilities used in the transportation of property*, and were freight depots, yards, or grounds used in the delivery of such property, and that *the service described is clearly a service in connection with the receipt, delivery, storage, and handling of property transported.*"

* * * * *

"The enactment of the paragraph in question (sec. 15 (5)) is traceable to our decision in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, wherein we upheld the carriers in their refusal to absorb on shipments of livestock the increases in loading and unloading charges of the public stockyards at Chicago. The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges to the line-haul charges on shipments of livestock to and from

public stockyards. The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1, or to restrict our jurisdiction.".

"We find that the charges herein assailed in so far as they were assessed for the use of the stockyard facilities in effecting delivery of interstate shipments *were charges for transportation* within the meaning of that term as defined in section 1 of the interstate commerce act, and that we have jurisdiction to pass upon the legality and reasonableness of such charges. We further find that the collection of such charges without tariff authority was in violation of section 6 of the interstate commerce act."

The doctrine announced in the *Allied Packers case* was reaffirmed by the Commission in *E. Kahn's Sons Co.* v. *Baltimore & Ohio R. Co.*, 192 I. C. C. 705, where, after discussing section 15 (5), the Commission said (p. 709):

"The shipping public is entitled to reasonably convenient and safe chutes, pens, and ways for discharging livestock from the cars, and taking them from the carriers' premises *without a yardage charge*. Not until the livestock can be so removed does the line-haul transportation cease."

The next case upon this point decided by the Commission was *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, printed in full at pp. 24-38 of the appendix to this brief. Following its conclusions in the *Allied Packers case* and the other cases above cited, the Commission held that live stock, in carloads, consigned to complainant at the Union Stock Yards "was not and is not subject to yardage charges where delivery was or is taken at unloading pens".

The next case involving similar issues was *Adolf Gobel, Inc.* v. *Baltimore & O. R. Co.*, 200 I. C. C. 606. In that case it appeared that no charge was made if mere egress from the yards was all that was sought by the consignee, but a

charge was made if the consignee desired or received yardage service. The dismissal of that complaint was therefore in consonance with the decisions heretofore quoted.

After the present case had been submitted to the Commission its attention was called by appellants to the decision of this court in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198, in which this court again held that the doctrine of the *Covington case* is still the law of the land and that the Commission's order in the *Hygrade case* was set aside "on the sole ground" that the Commission failed to make appropriate findings of fact. The decision of this court (December 4, 1939) is not mentioned in the decision of the Commission (April 8, 1940) although it established the error of the construction of the *Atchison case* adopted by the Commission in the present decision.

COMMISSION'S DECISION AS TO ITS JURISDICTION IN CONFLICT WITH LATER DECISION OF THIS COURT.

The Commission finds that it has no jurisdiction of the charges here involved for the access "which must be purchased" (p. 197 of Commission's decision, R. p. 55). To the contrary this court in the recent decision in *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, holds that the Commission is the only tribunal which has jurisdiction and says:

> "If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission."

Against the construction adopted by the Commission we have four decisions by this court (*United States*

v. *Union Stock Yard & T. Co.*, 226 U. S. 286, 57 L. ed. 226; *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382; *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198; *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771).

This is the paramount and controlling point in this case. If the court is of opinion that the Commission erred in its construction of the law, and its denial of its own jurisdiction, the order of the Commission should be set aside and the case remanded for further consideration by the Commission within the terms of the law. The other points set forth in the Commission's decision must fall, if its holding is incorrect as to its lack of jurisdiction.

THE LEGISLATIVE HISTORY OF SECTION 15 (5) OF THE INTERSTATE COMMERCE ACT DOES NOT SUPPORT THE CONCLUSION OF THE COMMISSION TO THE EFFECT THAT SECTION 15 (5) WAS INTENDED TO SUPERSEDE OR MODIFY SECTION 1 (3) OF THE INTERSTATE COMMERCE ACT OR THE LAW OF THE COVINGTON CASE AS TO UNLOADING AND DELIVERY OF LIVE STOCK BY RAILROAD COMMON CARRIERS AT PUBLIC STOCK YARDS.

At pages 192 and 193 of its decision (R. pp. 49-51) the Commission reviews the legislative history of section 15 (5) and reaches the conclusion that section 15 (5) was intended to supersede the requirements of section 1 (3) as to the delivery of live stock at public stock yards. The Commission reached exactly the opposite conclusion, upon review of the same legislative history, in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, decided in 1930. We quote that portion of said decision relating to the legislative history (p. 646, pp. 20, 21 of appendix to the brief):

> "The enactment of the paragraph in question is traceable to our decision in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, wherein we upheld the carriers in their refusal to absorb on ship-

ments of livestock the increases in loading and unloading charges of the public stockyards at Chicago. The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges to the line-haul charges on shipments of livestock to and from public stockyards. *The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1, or to restrict our jurisdiction.* The sense of the paragraph is that the services named shall be performed at the carrier's expense without additional charge to the shipper.

"The specific enactment takes precedence over the general enactment only where there is conflict between the two; in the absence of conflict both must be given effect. A specific provision that with respect to certain shipments certain services shall be included within the term transportation is not in conflict with a general provision which merely includes in the same term a great variety of services with respect to all classes of shipments. If a particular service is included in the general definition, the failure to include the same service in a specific provision covering certain shipments does not indicate an intention to exclude such services. The paragraph in question contains no words indicating an intention to repeal or modify section 1 (3), and repeals by implication will not be indulged if there is any other reasonable construction. *25 Ruling Case Law*, page 918."

THE PRESENT CONCLUSION OF THE COMMISSION, BASED UPON THE LEGISLATIVE HISTORY OF THE AMENDMENT, IS ALSO IN DIRECT CONFLICT WITH THE VIEWS EXPRESSED BY THE COMMISSION IN ATCHISON, T. & S. F. R. CO. V. UNITED STATES, 295 U. S. 193, 79 L. ED. 1382.

A brief was filed by the Commission in this court in 1935 in *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382 (in which was reviewed the Commission's decision in *Hygrade Food Products Corp.* v.

Atchison, T. & S. F. Ry. Co., 195 I. C. C. 553). Because we consider the discussion of this point by the Commission in that brief exhaustive and correct, we have printed the Commission's argument thereon at pages 49-55 of the appendix to the brief.

The conclusion of the Commission in connection with its discussion of the legislative history was as follows:

> "There is nothing in the language of section 15 (5), nothing in its legislative history, nothing in the Packers & Stockyards Act, and nothing in the legislative history of that Act, *to indicate an intention to relieve common carriers from their time-honored duty of making delivery of live stock without extra charge through their established live stock terminal, whether owned by themselves or hired from somebody else.*"

We also call attention to the argument presented by the Commission in the same brief appearing at pages 56-58 of the appendix to this brief, in which the Commission reached the conclusion that nothing in the *Packers and Stockyards Act, 1921*, nor the legislative history thereof, affects the jurisdiction of the Commission under the *Interstate Commerce Act* in so far as the delivery of live stock through public stock yards is concerned.

THE LEGISLATIVE HISTORY AS STATED BY THE COURTS SUPPORTS THE FORMER POSITION OF THE COMMISSION.

The legislative history of section 15 (5) was not summarized in the majority decision in *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193, 79 L. ed. 1382, but was the subject of discussion in the dissenting opinion of Mr. Justice (now Chief Justice) Stone who was joined by Mr. Justice Brandeis and Mr. Justice Cardozo. There is nothing in the majority opinion to show that the majority differed from the minority as to the legislative history. We therefore quote the following from the dissenting opinion (p. 207):

> "The section was added by way of amendment to the bill which became the Transportation Act of (Feb-

ruary 28) 1920, chap. 91, 41 Stat. at L. 456, U. S. C. title 49, § 71, in consequence of representations made to the Committee on Interstate and Foreign Commerce of the House in behalf of the American National Live Stock Association and the National Live Stock Shippers League. See 59 Cong. Rec. 674. Their representative made bitter complaint of the practices of carriers and stock yards, in adding terminal charges to the scheduled carrier rates, so that shippers could not know in advance the cost of the complete transportation service involved in taking live stock from the point of shipment into the hands of the consignee ready to receive it at point of delivery. The resolution of the Associations asked the enactment, as a part of the Interstate Commerce Act, of the rule of the Covington Stock-Yards Co. Case, and specifically 'that there be one through rate on live stock for the whole services from point of origin to the destination at public stockyards * * * which shall include unloading into suitable pens and delivery therein at such stock yards * * * including such facilities as are necessary or in use for making such delivery.' See Hearings before the Committee on Interstate and Foreign Commerce on H. R. 4378, House of Representatives, 66th Cong., 1st Sess., pp. 139, 141, 874, 875, 881.

"In introducing the amendment in the Senate, Senator Cummins, Chairman of the Interstate Commerce Committee, referred to the request of the Live Stock Association in emphasizing the purpose of the amendment, which he stated was to require the series of services rendered in connection with the transportation to be performed for a single scheduled rate. 59 Cong. Rec. 674. On the coming in of the conference report on the bill recommending it in its final form, the House Managers made a statement that the purpose of the amendment was to provide that the 'through rates on live stock should include unloading and other incidental charges.' 59 Cong. Rec. 3264. The legislative history from beginning to end indicates unmistakably the single purpose to give the Commission authority to remove the very abuses described

and forbidden by the Court in the Covington Stock-Yards Co. Case. It would be an incongruous result of this legislation if, by forbidding an unlawful charge for putting the live stock into the unloading pens, it had made lawful the same charge for taking it out, and had thus condemned the aggrieved shippers and consignees to the limbo from which they were earnestly striving to escape. An interpretation of a statute leading to an absurd result is to be avoided where reasonably possible, as it plainly is here. See *United States* v. *Katz*, 271 U. S. 354, 357, 70 L. ed. 986, 988, 46 S. Ct. 513; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212, 47 L. ed. 1016, 1020, 23 S. Ct. 787."

It is submitted that the more recent decision of the court in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198, sustains the finding based upon the legislative history just quoted, for the court there states that "without the aid of these statutes the transportation of livestock by rail was held to begin with its delivery to the carrier for loading onto its cars, and to end only after unloading for delivery or tender to the consignee at the place of destination" and that "the same rule has been repeatedly applied since the statute was adopted."

To the same effect is the decision of the Circuit Court of Appeals for this Circuit in *Armour & Co.* v. *Alton R. Co.*, 111 F. (2d) 913, where the court said that the rule above stated was the rule at common law and is the rule under the *Interstate Commerce Act*, citing said decision of the Supreme Court.

It is respectfully submitted that the Commission erred, as a matter of law, in so much of its decision as is based upon its consideration of the legislative history of section 15 (5).

II.

The District Court Erred in Failing to Find That the Charges Here Assailed, in so Far as They Were Assessed for the Use of Stock Yard Facilities in Effecting Delivery of Interstate Shipments of Live Stock, Were Charges for Transportation Within the Meaning of That Term as Defined in Section 1 (3) of the Interstate Commerce Act; That the Interstate Commerce Commission Has Jurisdiction to Pass Upon the Legality and Reasonableness of Such Charges; That, If the Present Railroad Rates to the Railroad Defendants' Station at the Union Stock Yards Do Not Afford Compensation to the Railroads for Egress from the Pens to a Public Street, the Commission May and Should Prescribe a Reasonable Additional Charge for Such Egress; and That, If Use of the Terminal Facilities of the Union Stock Yards for Egress from Unloading Pens to a Public Street Is a Part of Transportation and If This Use Is a Service for Which Reasonable Compensation Is Justified, This Charge, Like the Unloading Charge, Is a Part of the Reasonable Transportation Rate, Determination of Which Is Committed to the Jurisdiction of the Interstate Commerce Commission, as Specified in Assignments of Error Nos. 13, 14, and 15.

The District Court was specifically requested to make the finding stated in the foregoing caption but declined to do so (R. p. 82).

The proposition that charges paid in order to obtain the necessary use of stock yard facilities in effecting delivery of interstate shipments are charges for transportation within the meaning of that term as defined in section 1 (3) of the act was determined by the Commission itself in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, where the Commission said (p. 647, appendix to brief, p. 22):

> "We find that the charges herein assailed in so far as they were assessed for the use of the stockyard facilities in effecting delivery of interstate shipments *were charges for transportation* within the meaning of that term as defined in section 1 of the interstate commerce act, and that we have jurisdiction to pass upon the legality and reasonableness of such charges. We

> further find that the collection of such charges without tariff authority was in violation of section 6 of the interstate commerce act."

This proposition is also affirmatively determined by the decision of this court in *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, where this court said (pp. 200, 201):

> "If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission."

We contend that under the decision of this court, if the present railroad rates to the railroad defendants' station at the Union Stock Yards, Chicago, do not afford compensation to the railroads for the necessary expense for egress from the pens to a public street, *the Commission may and should prescribe a reasonable charge for such egress.* This possibility was anticipated by counsel for appellants during the trial of the case before the Commission. Appellants did not seek throughout the hearings before the Commission to have this service accorded free of charge if in fact it will involve the carriers in more than their present cost. To that extent the actual terms of the prayer of the complaint were amended at the hearing (R. pp. 218, 219, 223).

The evidence shows that these so-called yardage charges for full stock yard services average $11.25 per car on cattle, $25.20 per car on calves, $13.50 per car on hogs, and $23.30 per car on sheep (R. p. 236).

As indicated in that portion of the record to which reference is made, appellants are not asking for stock yard services, and the Commission has so found (R. pp. 40, 41). Appellants are perfectly willing to have the Commission fix

an additional charge for egress of direct shipments, if the carriers incur additional expenses in affording such egress. *We are not asking for the future that a cent be taken from the present earnings of the railroads, and this has been made plain throughout the hearings before the Commission.*

In view of this fact we have been somewhat surprised by the earnest opposition of the railroad defendants, apparently upon the theory that it would cost them something and add to their present operating expenses.

We believe it fair to say that appellants anticipated the rule announced in the recent decision in *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, where this court said (p. 201):

> "*Third.* If the railroad delivers through the public stock yards, and petitioner's position is sustained, the railroad must necessarily absorb the additional charge. Under the complaint, this would be upon the basis that the railroad had not fully performed its transportation service. Yet the tariff charges for shipping petitioner's livestock were based upon the long-standing custom in which petitioner and the other packers had acquiesced. The railroad is entitled to receive and the shipper is required under the statute to pay a just and reasonable rate. A court judgment in favor of petitioner would reduce the compensation of the railroads for the performance of their services, and would in effect constitute a readjustment of their rate schedules."

Assuming that egress is required as a matter of law and conceding, but without knowing certainly, that egress might require the railroads to pay the stock yard company something in addition to its present loading and unloading charges—something for the use of the shortest route to a public street—appellants have taken the position that the Commission should add to the line haul rate such an amount as it might be necessary for the railroads to pay, if any.

THE COMMISSION ERRED IN GIVING WEIGHT TO THE FACT, IF TRUE, THAT THE RAILROADS DO NOT OBTAIN COMPENSATION FOR YARDAGE. IT IS THE DUTY OF THE COMMISSION TO FIX A PROPER CHARGE FOR EGRESS, AND THIS COURT HAS SO HELD.

It was alleged in the complaint in the District Court (par. 25, R. p. 20) that the Commission erred in basing its decision in part on the following finding at page 188 of the decision (R. p. 45):

> "They (meaning the carriers) have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover *yardage* services."

It is submitted that the findings so made by the Commission do not constitute a ground for dismissal of the complaint. It should be obvious that the rates to the stock yards not only do not include an allowance to cover *yardage* services, but should not. No *yardage* service is desired.

If, however, the rates are not now sufficiently high to cover such additional cost as may be incurred by the railroad defendants in providing mere egress, the Commission should have held this charge to be a transportation charge, as it did in *Allied Packers v. Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, and should have determined what would be a proper additional charge, if any, for egress.

The Commission was in fact urged by appellants to do this during the course of the hearing. The record, at pages 219, 220, 221, and 369, shows this action on the part of appellants. The Commission may not lawfully avoid the duty to make a proper readjustment of the line haul rates on *directs*, to cover any additional expense incurred by the line haul carriers, if appellants, as a matter of law are entitled to egress.

We submit that the Commission erred in disclaim-

ing jurisdiction and dismissing the complaint instead of performing its duty of determining what would constitute a reasonable charge for the transportation service of mere egress.

III.

The District Court Erred in Failing to Find That No Stock Yard Services, Subject to the Packers and Stockyards Act, 1921 (U. S. C. A. Tit. 7, § 201), Are Desired or Requested by Appellants in Connection with the Delivery of Live Stock by the Railroad Defendants at Their Station at the Union Stock Yards in Chicago, as Specified in Assignment of Error No. 1.

Title III, section 301 (b), of the *Packers and Stockyards Act, 1921* (U. S. C. A. Tit. 7, § 201(b)) defines stock yard services as follows:

> "The term 'stockyards services' means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;"

The prayer of the complaint before the Commission (exhibit "A" to the complaint in the District Court, R. pp. 24-33) requested an order of the Commission providing in substance that appellants "be permitted egress for removal from said unloading pens of such live stock to the nearest public street, via the shortest or most convenient way, to be designated by defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yard and Transit Company of Chicago."

The stock yard services performed by the stock yard company under this provision of the law and in accordance with its tariff filed with the Secretary of Agriculture are described in detail at pages 159-175 of the record. The services of the stock yard company and the charges therefor include the service of feeding, watering, holding in pens

for disposition by commission men, delivery to commission men, weighing for commission men, taking live stock to pens for outbound shipment, and weighing in order to enable the buyer and seller to determine the amounts to be paid. It is there made clear that none of those services are desired, requested, or needed by appellants. Yet appellants must pay for these stock yard services in their entirety.

The decision of the Commission sufficiently shows that none of these services are desired or requested by appellants. That proposition is clearly stated in the following language at page 184 of the Commission's decision (R. pp. 40, 41):

> "All of such shipments have been purchased at points other than Chicago for shipment to Chicago for immediate slaughter. The livestock comprising such shipments is not fed or watered in the yards. It has not been weighed on scales of the Yard Company since 1933, when complainant installed scales tested and supervised by the Western Weighing and Inspection Bureau, an agency of defendants, on its own property where the weighing is done by complainant's employees. Complainant does not request or desire that any of its direct shipments be held or placed in holding pens. It is prepared to have crews of men ready at any hour of the day or night to move its stock from the unloading pens.
>
> "'Complainant demands that defendants accord it the right to take possession of the animals at the unloading pens immediately after they are placed in such pens, and to remove them immediately from such pens through the property of the Yard Company to the nearest public street free from the payment of a yardage charge."

IV.

The District Court Erred in Failing to Find That Section 406 (a) of the Packers and Stockyards Act, 1921 (U. S. C. A. Tit. 7, § 226), Reserves to the Interstate Commerce Commission Power and Jurisdiction Over All Matters Relating to the Transportation and Delivery of Live Stock by Railroad Common Carriers, Including All Services Essentially a Part of Such Transportation and Delivery; and in Failing to Find That the Commission Erred in Holding That the Secretary of Agriculture Has Asserted or Has Jurisdiction Over, and Has Fixed Charges For, Mere Egress from Railroad Unloading Pens at Public Stock Yards to a Public Street for Live Stock Upon Which No "Yardage Service", as Defined in the Packers and Stockyards Act, 1921, Is Requested, Desired, or Received, as Specified in Assignments of Error Nos. 17 and 19.

A finding upon this point was requested of the District Court by appellants (R. pp. 84, 85, proposed findings Nos. 9 and 11), but the District Court did not make a specific finding thereon.

Section 406 (a) of the *Packers and Stockyards Act, 1921*, (U. S. C. A. Tit. 7, § 226) reads as follows:

> "SEC. 406 (a). Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission."

At page 195 of its decision (R. pp. 53, 54) the Commission states* that the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at many public yards and, in support thereof, it cites three cases:

> *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 80 L. ed. 1033.

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*"In the administration of the Packers and Stockyards Act, the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at many public yards. Orders of the Secretary prescribing the charges for this service at three public stockyards have been sustained in court proceedings. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Denver Union Stock Yards Co.* v. *United States*, *supra*; *Union Stock Yards Co. of Omaha* v. *United States*, 9 Fed. Supp. 864. The yardage charges now applicable at the public stockyards at St. Joseph, Mo., Denver, Colo., and Omaha, Nebr., for use of facilities and services of the yard companies in connection with egress for direct shipments consigned to packers are those prescribed by the Secretary."

Denver Union Stock Yard Co. v. *United States*, 304 U. S. 470, 82 L. ed. 1469.

Union Stock Yards Co. of Omaha v. *United States*, 9 F. Supp. 864.

The court will read these decisions in vain to find any word, phrase, or sentence referring to mere egress at a public stock yards.

The decisions of the Secretary of Agriculture in these cases were filed as exhibits in the hearings before the Commission and are now before this court as a part of the exhibits separately certified on this appeal. They are—

B.A.I. Dkt. No. 298, *Secretary of Agriculture* v. *St. Joseph Stock Yards Company* (exhibit 43 in the present case).

B.A.I. Dkt. No. 450, *Secretary of Agriculture* v. *Denver Union Stock Yard Company* (exhibit 41 in the present case).

B.A.I. Dkt. No. 344, *Secretary of Agriculture* v. *Union Stock Yards Company of Omaha, Ltd.* (exhibit 42 in the present case).

A complete discussion of these decisions of the Secretary, with quotations therefrom, appears at pages 76-83 of the appendix to the brief and will not be repeated here. Each case was instituted by the Secretary of Agriculture on his own initiative to determine reasonable rates for *stock yard services* under the *Packers and Stockyards Act, 1921*—not to determine any duty of a railroad. They show that *no question of mere egress from a railroad unloading pen to a public street was involved in any of the three cases.* They show that in each instance the Secretary fixed charges covering a complete stock yard service of holding, feeding, watering, placing in commission men's pens, etc. In each of the three cases before the Secretary *neither a railroad nor a shipper was a party.*

No one was before the Secretary in any of these cases demanding that the railroads afford egress from the unloading pens without stock yard service. Such a complaint could not have been brought before the Secretary, because whatever duty a railroad carrier may have in that respect devolves upon the carrier with whom the shipper has a contract of transportation and not upon a stock yard company which undoubtedly has the right to charge separately for all stock yard services rendered by it under the *Packers and Stockyards Act, 1921.*

In this connection it is interesting to note that the Commission has cited the *Denver case* (*Denver Union Stock Yard Co.* v. *United States,* 304 U. S. 470, 82 L. ed. 1469) as supporting the proposition that the Secretary of Agriculture has assumed jurisdiction over egress while this court, in *Union Stock Yard & T. Co.* v. *United States,* 308 U. S. 213, 84 L. ed. 198, at page 219, cites that very decision as supporting the doctrine of *Covington Stock Yards Co.* v. *Keith,* 139 U. S. 128, 35 L. ed. 73.

The distinction between stock yard service and mere egress, and the reasons why jurisdiction over the latter remains in the Commission, have perhaps nowhere been better stated than in the *Commission's brief* in this court in *Atchison, T. & S. F. R. Co.* v. *United States,* 295 U. S. 193, 79 L. ed. 1382, which is quoted from at length at pages 39-58 of the appendix to this brief. We here quote what was said by the Commission upon that point (appendix to brief, p. 55):

> "It is true of course that in the great majority of instances the transportation of live stock to public stockyards does end upon the unloading of the animals into suitable pens, *because the great bulk of live stock shipments to public stockyards are intended for commission men and traders doing business in the yards. In such instances a stockyards' service is furnished* and when that is so the common-carrier transportation, and consequently the jurisdiction of this

Commission, ends upon the unloading and thereupon the jurisdiction of the Secretary of Agriculture under the Packers & Stockyards Act begins. The decision of the Supreme Court of Missouri in *Burton* v. *Wabash Ry. Co.*, 58 S. W. (2d) 443, so holds, the live stock shipments there involved, transported from a point in Missouri to the public stockyards at East St. Louis, Ill., having been consigned to a commission merchant doing business at the stockyards. But it is shown by the decision of this Court in the *Covington* case, by the decisions of the Commission in the *Allied Packers* case, in the *Kahn* case, in the *Gobel* case, and in the case at bar, *that public stockyards frequently function in another capacity, and that is as a place of receipt and delivery, a live stock depot, for the railroads; and under the above decisions where the consignee seeks no stockyards' services but takes delivery at the time of unloading of the animals from the car and drives them directly out of the yards, no extra charge may be made for that privilege.* There is nothing in the language of section 15 (5), nothing in its legislative history, nothing in the Packers & Stockyards Act, and nothing in the legislative history of that Act *to indicate an intention to relieve common carriers from their time-honored duty of making delivery of live stock without extra charge through their established live stock terminal, whether owned by themselves or hired from somebody else.*"

The section of the *Packers and Stockyards Act, 1921*, (U. S. C. A. Tit. 7, § 226, appendix to brief, p. 5), providing that nothing in that act should affect the power or jurisdiction of the Commission, was passed in 1921.

The jurisdiction of the Commission over mere egress was exercised as late as 1930 in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, and as late as 1933 in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553. The Commission's jurisdiction over the subject matter was made clear by this court in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198, decided in 1939. If there remained any doubt

upon this point, it was finally set at rest in *Armour & Co. v. Alton R. Co.*, 312 U. S. 1[illegible], 85 L. ed. 771 (decided in February, 1941) where this court said (p. 200):

> "If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission."

V.

The District Court Erred in Failing to Find That the Union Stock Yard and Transit Company Is a Terminal of the Railroad Defendants, Within Section 1 (3) of the Interstate Commerce Act; Performs Their Railroad Terminal Services (as Their Agent); and Files with the Interstate Commerce Commission a Tariff Naming Its Charges for Terminal Services "As Railroad's Agent"; That the Union Stock Yards Is Named in the Railroad Tariffs as a Specific Station to Which the Railroad Rates to Chicago Are Applicable; That the Union Stock Yards at Chicago Have Become the Common Live Stock Depot of the Railroad Defendants; and That the Stock Yard Company, in Supplying Its Unloading Facilities and Runways (as Agent for the Railroads), Performs the Transportation Services Which the Railroad Defendants Are Under a Duty to Render, as Specified in Assignments of Error Nos. 5 and 6.

Specific findings upon the points here stated were requested of the District Court by appellants, but none were made. See record pages 78, 79, page 4 of findings of fact and conclusions of law requested by appellants.

That the Union Stock Yards is named in the railroad tariffs as a specific station to which the railroad rates to Chicago are applicable is undisputed. The method of tariff publication by which this result is accomplished is described minutely in the testimony of the witness Tally (R. pp. 183-186). The line haul railroads

publish an allowance to the stock yards of $1.25 per single deck car and $1.50 per double deck car for unloading live stock. The stock yard company files with the Interstate Commerce Commission its tariff which publishes the same amounts as charges for unloading live stock "as carrier's agent" (R. pp. 180, 181).

That the railroad defendants have in fact made the Union Stock Yards their own terminal for delivery of live stock in Chicago has been decided too often by this court and by the Commission to be open to question.

Referring to the Union Stock Yards at Chicago, this court said, in *Adams* v. *Mills*, 286 U. S. 397, 76 L. ed. 1184, at page 409:

> "That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so."

In the recent decision in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198, the court said (p. 219):

> "That appellant's stockyard is a terminal of the line-haul carriers, and that it performs their railroad terminal services within the meaning of the Act was recognized in *Adams* v. *Mills*, *supra*, (286 U. S. 409, 76 L. ed. 1192, 52 S. Ct. 589) and also in *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382, 55 S. Ct. 748, *supra*."

To the same effect was the decision of the Circuit Court of Appeals for the seventh circuit in *Armour & Co.* v. *Alton R. Co.*, 111 F. (2d) 913, 915:

> "Thus it came to pass that these yards—providing such facilities as loading and unloading platforms chutes and alleys, unloading and holding pens, and other livestock conveniences—became the common livestock depot of the defendant carriers. The Yards Company, in supplying its yards, performs there the transportation services which the carriers are under a duty to render."

In the early case of *Cattle Raisers' Asso.* v. *Chicago, B. & Q. R. Co.*, 11 I. C. C. Rep. 277, the Commission said:

"The tariffs of the defendants all specified a rate to Chicago and under this tariff *the public were entitled to ship to the Union Stock Yards*" (p. 289).

"What we call attention to is the fact that a railroad may maintain its live stock depot at a particular point although it neither builds nor repairs nor insures the stock pens into which the cattle are unloaded nor hires nor controls the men who do the unloading. Whether the Union Stock Yards at Chicago were in railroad phraseology or in legal definition the depot of these defendants is immaterial; they were and still are in fact the point to which this stock is transported and unloaded under the shipping contract of the defendants" (p. 293).

In *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, 219, 220, the Commission (referring to the Chicago Union Stock Yards) said:

"These stock yards, however, are in fact a terminal for the receipt and delivery of live stock; that is one of the purposes for which they were created and one of the uses to which they are now put. The situation appears to be exactly the same as it would be were the stock yards outside the city limits of Chicago. The stock yards must be the terminal for the receipt and delivery of live stock of the railroad utilizing them."

In *Live Stock Loading and Unloading Charges*, 58 I. C. C. 164, 168, (referring to the Chicago yards), the Commission found:

"Under this state of facts we are of opinion and find that the stock yards are in effect *terminals of the line-haul carriers*, the Junction company, and the stock yard company."

In *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, 554, the Commission said:

"The Union Stock Yards are public yards served over the rails of the Chicago Junction by the individual

line-haul carriers bringing livestock to Chicago, and they are the livestock terminal at Chicago of all of these carriers."

In *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330, 336, 337, the Commission said:

> "Through custom and usage respondent's yards have become *for all practical purposes the sole terminal in Chicago* for the receipt of the major portion of livestock reaching that point by rail, and respondent by reason of its practices has held itself out as ready to perform part of the interstate transportation necessary to effect delivery."

In *Chicago Live Stock Exc.* v. *Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, there was a detailed description of the facilities in and about Chicago and in that connection the Commission said at page 545:

> "The line-haul carriers operate over the tracks of the Chicago Junction to the Union Stock Yards and make delivery there, thereby making these yards their own terminals."

In the same decision, finding No. 5 of the Commission (p. 551) was as follows:

> "The railroads recognize their obligation to deliver on their own rails under the line-haul rate and without extra expense. To give color, therefore, to the claim that delivery at the Union Stock Yards is an extra service justifying an extra charge, a number of them make a pretense of providing points for livestock delivery on their own rails. *The record shows, however, that these points are nothing more than a pretense, are not used, and could not be used to effect suitable and adequate deliveries.* As a matter of fact, as above stated, the Union Stock Yards is a point of livestock delivery for all the lines and it is, through trackage rights, in effect located on their own rails."

In *Livestock To or From Union Stock Yards, Chicago*, 222 I. C. C. 765, 766, the Commission said:

> "As was stated in *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330, the Union Stock Yards

'have become for all practical purposes the sole terminal in Chicago for the receipt of the major portion of livestock reaching that point by rail'."

Thus we find an unbroken line of decisions of the Commission, commencing in 1905, which hold that the stock yards are the terminals of the line haul carriers for the delivery of live stock.

In *Central Stock Yards Co.* v. *Louisville & N. R. Co.*, 192 U. S. 568, 48 L. ed. 565, referring to the Bourbon Stock Yards at Louisville, Ky., which are and always have been public stock yards exactly similar to those at Chicago, this court said (p. 570):

> "The Bourbon Stock Yards are the defendant's depot. *They are its depot none the less that they are so by contract, and not by virtue of a title in fee.* • • • The fact that plaintiff's stock yards are public does not change the case."

The facts of record to which reference has been made, together with the decisions here quoted, establish the proposition that the Union Stock Yards have become the common live stock depot of the railroad defendants at Chicago and that the stock yard company, as agent of the railroads, there performs the transportation services which the carriers are under a duty to render.

VI.

The District Court Erred in Failing to Find That the Union Stock Yard and Transit Company Functions in a Dual Capacity: (a) As a Public Stock Yards Providing Stock Yard Services, Subject to the Packers and Stockyards Act, 1921; and (b) as a Common Carrier by Railroad Subject to the Interstate Commerce Act, in Which Latter Capacity the Stock Yard Company Provides (as Railroad's Agent) Terminal Facilities for the Delivery of Live Stock, Which Are a Part of the Railroad Defendants' Railroads, Under Section 1 (3) of the Interstate Commerce Act, as Specified in Assignments of Error Nos. 7 and 8.

The propositions stated in this point are undisputed (Commission's decision herein, R. pp. 37, 38). The Union Stock Yard and Transit Company does function

in a dual capacity. That company has been designated by the Secretary of Agriculture as a public stock yards subject to the *Packers and Stockyards Act, 1921* (U. S. C. A. Tit. 7). For stock yard services it files a tariff with the Secretary of Agriculture. At the time of the hearing before the Commission these services and the charges therefor were stated in U. S. Y. & T. Co. tariff No. 10 which is exhibit 3 in the exhibits transmitted to this court separately from the transcript of evidence.

It is undisputed that the Union Stock Yard and Transit Company also provides "as railroad's agent" terminal facilities and services for the railroads, which become in substance railroad facilities (paid for by the railroads) under section 1(3) of the *Interstate Commerce Act*. Acting in this capacity, the Union Stock Yard and Transit Company has been held to be a common carrier by railroad subject to the *Interstate Commerce Act* and files its tariff with the Interstate Commerce Commission. This latter point was decided by this court in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198.

Specific findings to this effect were requested of the District Court by appellants (R. pp. 70, 80), but were not made.

VII.

The District Court Erred in Failing to Find That the Fact That Egress from the Railroad Defendants' Unloading Pens to a Public Street Would Necessarily Be Across Property of Their Agent, Union Stock Yard and Transit Company, Does Not Deprive the Commission of Authority to Make an Order Against Said Railroad Defendants Requiring Egress for Appellants' Shipments, With or Without a Rate Change Covering Such Service, as Specified in Assignment of Error No. 16.

The Commission appears to have construed the fact that egress from the unloading pens to a public street would be across property of the stock yard company as an

insuperable bar to the relief here sought. The Commission said (decision, pp. 184-185, R. p. 41):

> "Because of the physical situation at the Union Stock Yards, defendants could not provide an egress from the unloading pens to a public street, except by use of the property of the Yard Company."

It is true that, having placed the live stock within the confines of the stock yards, they could not be driven to a public street except by crossing certain stock yard property. But this fact is without legal significance in the present controversy. A finding to this effect was sought in the District Court. See Findings of Fact and Conclusions of Law proposed by appellants (R. p. 83). But no finding was made by the District Court.

We have shown (this brief, pp. 41, 42) that the railroad defendants name rates on live stock to the Union Stock Yards as a station on their lines; that in substance the railroad defendants lease the stock yard unloading pens, in lieu of providing pens of their own, by payment to the stock yard company of a stated amount per car; that the stock yard company files with the Commission its tariff naming its charges for loading and unloading live stock "as carrier's agent"; and that the stock yard company has been held to be a common carrier by railroad in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198.

These facts being undisputed, certain statutory provisions come into play which in effect make the property of the stock yards a part and parcel of the railroads in so far as they are necessary or used in transportation. This is so for the following reasons:

(a) The definition of railroad in section 1 (3) (a) of the Interstate Commerce Act includes "all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, *agreement*, or lease, * * * *all* * * * *terminal facil-*

ities of every kind * * * necessary in the * * * *delivery* of any such property".

(b) The term "transportation", as defined in section 1 (3) of the act, includes "all instrumentalities and facilities of shipment or carriage, *irrespective of ownership or of any contract, express or implied, for the use thereof* * * * in connection with the * * * delivery * * * of property transported."

(c) Section 1 (6) places upon the defendants the duty to "establish * * * just and reasonable regulations and practices affecting * * * *delivery* of property * * * upon just and reasonable terms."

(d) Section 15 (1) authorizes the Commission to prescribe a *regulation* or *practice* where it finds the present regulation or practice to be unjust or unreasonable, or otherwise in violation of the act.

(e) Section 16 (7) provides that "it shall be the duty of every common carrier, its *agents* and employees, to observe and comply with such orders so long as the same shall remain in effect."

Thus the terms of the law definitely establish the proposition that ownership is immaterial if such property is used in a transportation service. The stock yard company holds itself out, as a common carrier, as the agent of the railroad defendants. Under section 16 (7) therefore the stock yard company, as the agent of the railroad defendants, would be bound to comply with any order made against the railroad defendants.

The right of the shipper or consignee to a reasonable practice or charge, and the power of the Commission to grant the necessary relief by order, is not dependent upon the ownership of the particular facility used by the railroad but is dependent solely upon the use of the facility for transportation purposes.

The railroad defendants have selected the point in Chicago where they have located their only proper and adequate facilities for the delivery and unloading of live stock

That point is on the property of their agent, Union Stock Yard and Transit Company, *a common carrier by railroad.* Those facilities are rented by the railroad defendants from their agent and have, by compulsion of the statute, become the facilities of the railroads to the same extent as if owned by them.

The railroad defendants have in fact made the stock yards their own terminal for the delivery of live stock. That point has been decided too often to be open to question. In support of this proposition we refer to the following decisions which have been quoted in part at pages 42-45 of this brief:

Adams v. *Mills*, 286 U. S. 397, 76 L. ed. 1184.

Atchison, T. & S. F. R. Co. v. *United States*, 295 U. S. 193, 79 L. ed. 1382.

Union Stock Yard & T. Co. v. *United States*, 308 U. S. 213, 84 L. ed. 198.

Armour & Co. v. *Alton R. Co.*, 111 F. (2d) 913.

Cattle Raisers' Asso. v. *Chicago, B. & Q. R. Co.*, 11 I. C. C. Rep. 277.

Live Stock Loading and Unloading Charges, 52 I. C. C. 209.

Live Stock Loading and Unloading Charges, 58 I. C. C. 164.

Hygrade Food Products Corp. v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553.

Livestock Loaded and Unloaded at Chicago, 213 I. C. C. 330.

Chicago Live Stock Exc. v. *Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531.

Livestock To or From Union Stock Yards, Chicago, 222 I. C. C. 765.

In *Central Stock Yards Co.* v. *Louisville & N. R. Co.*, 192 U. S. 568, 48 L. ed. 565, referring to the Bourbon Stock Yards at Louisville, Ky., which are and always have been

public stock yards exactly similar to those at Chicago, this court said (p. 570):

> "The Bourbon Stock Yards are the defendant's depot. *They are its depot none the less that they are so by contract, and not by virtue of a title in fee.* * * * The fact that plaintiff's stock yards are public does not change the case."

In stating this conclusion this court was merely repeating what it had said earlier in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 35 L. ed. 73:

> "If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees."

The Commission held in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, that yardage charges assessed for the use of stock yard facilities at a public stock yards in effecting delivery of shipments are charges for transportation. (See quotation from this decision at page 24 of this brief and the entire decision at pages 13-23 of appendix to the brief.)

If the stock yard company should insist upon additional compensation from the railroads, and the present line haul rates are not adequate to include such compensation, it becomes the duty of the *Commission to determine what would be a reasonable additional charge* for mere egress, and authorize it to be added to the existing freight charges on direct shipments where mere possession, *not yardage service*, is demanded by the consignee.

VIII.

The District Court Erred in Failing to Find That the Railroad Defendants Do Not Provide the Delivery of Live Stock to Which Appellants Are Entitled as a Matter of Law, by Placing Cars of Live Stock Upon Railroad Team Tracks or Appellants' Private Plant Tracks, Which Are Not Equipped with Unloading Facilities, Such as Chutes, Pens, or Yards, Necessary for the Delivery of Live Stock, as Specified in Assignments of Error Nos. 2, 3, 23, and 24.

The Commission found (decision, p. 189, exhibit "B" to the complaint, R. p. 46) that shippers of live stock to Chicago have the choice of consigning it to the Union Stock Yards, and having it unloaded there without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district without payment of a yardage charge. The Commission said (p. 189):

> "Under the provisions of the applicable tariffs of individual railroads serving Chicago, the shippers of livestock have the choice either of consigning it to the Union Stock Yards and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. In the latter case, they unload the cars themselves. Although the facilities available at such team tracks for the unloading of livestock are not extensive, *and do not include pens into which the stock may be unloaded*, they have been found ample for such shipments as have been placed on such tracks for unloading."

Findings by the District Court in conformity with this point were specifically requested (see plaintiffs' proposed findings Nos. 2, 3, 16 and 17, R. pp. 77, 87, 88) but none were made.

THE EVIDENCE SHOWS THAT THE RAILROAD TEAM TRACKS HAVE NO FACILITIES FOR UNLOADING LIVE STOCK.

Only two railroad witnesses testified concerning facilities for deliveries of live stock in Chicago on railroad team tracks. R. A. Sperry, one of these witnesses, testified in substance as follows:

> None of the railroad team tracks which I have examined have any chutes or runways for taking live stock out of the cars. I did not look at them while a car of live stock was being unloaded. I have not seen the operation. I did not see any facilities in the way of chute pens for getting live stock from the car to the ground (R. pp. 430, 431).

F. F. Hoffman, the only other witness who gave evidence concerning delivery of live stock on the railroad team tracks, testified substantially as follows:

> I have examined the places where team track deliveries of live stock are made. There are no facilities except the track. There are no pens, no unloading pens, merely open space beside the track. The recipient of the live stock backs his truck against the car door and moves the live stock into the truck. I do not know how they arrange to get truck delivery (R. p. 473).

The decision of the Commission itself states that the team tracks "do not include pens into which the stock may be unloaded".

THE DECISIONS SHOW THAT RAILROADS DO NOT PROVIDE A LAWFUL DELIVERY OF LIVE STOCK BY PLACING CARS UPON TEAM TRACKS WHICH ARE NOT EQUIPPED WITH PENS AND OTHER UNLOADING FACILITIES.

The conclusion of the Commission is contrary to the law upon the subject as heretofore declared by the courts and by the Commission itself.

In *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 35 L. ed. 73, the court said:

> "When live stock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except *in or through inclosed yards or lots*, convenient to the place of unloading."

That has continued to be the law since the passage of the *Interstate Commerce Act*. This rule was affirmed by the Supreme Court after enactment of the *Interstate Commerce Act*, in *United States* v. *Union Stock Yard & T. Co.*, 226 U. S. 286, 57 L. ed. 226 (1912).

This rule was stated by the Circuit Court of Appeals for the Sixth Circuit in *Central Stock Yards Co.* v. *Louisville & N. R. Co.*, 118 F. 113, 116, as follows:

> "The animals cannot be turned loose, or left without food or shelter in cars standing on the railroad tracks or sidings. They must be placed in suitable quarters, where they can be fed and cared for under the charge of competent agents. The nature of the property requires these services, essential to the discharge of the duty of the carrier in the safe transportation and delivery of live stock. For this purpose it is the duty of the carrier to make provision by suitable yards and proper equipment and competent persons to manage and control the care and delivery of the live stock."

The Commission has included delivery into suitable pens as a part of the carriers' duty in all of the decisions made by it under the *Interstate Commerce Act* except the present case. This point is established by the following decisions of the Commission:

In *A., T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92, at page 99, the Commission said:

> "Since the transportation of live stock begins with delivery to the carrier for loading upon its cars *and ends only after the stock has been unloaded by the carrier into suitable pens*, the movement over defendant's rails leading to its docks is transportation."

In *Switching Charges at South Omaha, Nebr.*, 36 I. C. C. 198, 200, the Commission said:

> "These earnings include receipts for loading and unloading live stock at the stockyards. They are properly included, as the transportation of live stock begins with delivery to the carrier for loading on its cars *and ends only after the stock has been unloaded by the carrier into suitable pens. A., T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92, 99."

In *Felin & Co.* v. *P. & R. Ry. Co.*, 37 I. C. C. 231, 233, the Commission said:

> "Carriers of live stock unquestionably must provide *suitable facilities* for loading, unloading, and caring for live stock, including suitable pens, but not at every point on their lines where dealers in live stock choose to establish their plants."

In *Dimmitt-Caudle-Smith Live Stock Commission Co.* v. *C., B. & Q. R. R. Co.*, 47 I. C. C. 287, the Commission said at page 318:

> "In this connection it may be added that the transportation of live stock does not terminate until after the stock has been unloaded by the carrier *into suitable pens. Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128; *United States* v. *Union Stock Yards*, 226 U. S. 286; *A. T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92, 99. The duty to unload stock *into suitable pens* includes the duty to provide such facilities and the means of reaching them, or else to hire those owned by others."

In *American National Live Stock Asso.* v. *A., T. & S. F. Ry. Co.*, 122 I. C. C. 609, 617, the Commission said:

> "Loading and *unloading pens and chutes* must be provided, not only at points where the traffic originates and where it is delivered, but at intermediate points as facilities for stopping stock in transit for water, feed, and rest."

A similar statement was again made in *E. Kahn's Sons*

Co. v. Baltimore & O. R. Co., 192 I. C. C. 705, at page 709, where the Commission said:

> "The shipping public is entitled to *reasonably convenient and safe chutes, pens and ways for discharging live stock from the cars*, and taking them from the carrier's premises without a yardage charge. Not until the live stock can be so removed does the line-haul transportation cease."

The Commission erred as a matter of law in holding, as it does, that because appellants may obtain delivery without yardage charges at the *team tracks*, where the railroads maintain no pen facilities, they are not entitled to delivery at the Union Stock Yards, the only point where the railroad defendants maintain such facilities. Appellants cannot be required to accept a delivery (team track delivery) which does not conform to the carriers' duty at common law or under the *Interstate Commerce Act*.

Certain of the practical reasons why unloading pens and chutes are necessary to a proper delivery of live stock are indicated in *Central Stock Yards Co.* v. *Louisville & N. R. Co.*, 118 F. 113, from which we have already quoted.

By the provisions of the so-called 28-Hour Law (45 U. S. C. A. §§ 71-74) railroads are required to unload live stock into properly equipped pens for rest, watering, and feeding at the end of twenty-eight or thirty-six hours. If this period should expire before the consignee arrived to remove the live stock from the cars on the team tracks, it is apparent that the railroads would not be in position to unload the live stock, as required by the 28-Hour Law, at the point where the cars are placed for unloading.

The Commission itself has held that the carriers' team tracks in Chicago are not suitable for the delivery of live stock. In *Chicago Live Stock Exc.* v. *Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, the Commission held in substance that such points do not provide adequate facilities, or in-

deed any facilities, for the unloading of live stock. At page 532 of the decision in that case, the Commission said:

> "While certain of the trunk lines claim that they have suitable places on their own rails at Chicago for the delivery of livestock, in connection with which delivery no charge in addition to the Chicago rate is made, * * * *the Union Stock Yards constitutes the only place in Chicago where livestock is delivered in substantial volume and adequate facilities therefor are provided.*"

We respectfully submit the court should find that a consignee may not lawfully be compelled to accept delivery of live stock by the railroads at tracks not provided with the necessary chutes and pens. Therefore an alternative method of delivery at Chicago without charge above the line haul rate to Chicago does not exist.

FOR THE REASONS STATED IN CONNECTION WITH TEAM TRACK DELIVERIES, IT IS ALSO APPARENT THAT THE RAILROADS DO NOT OFFER A LAWFUL DELIVERY OF LIVE STOCK BY PLACEMENT UPON INDUSTRIAL TRACKS NOT EQUIPPED WITH UNLOADING CHUTES AND PENS.

The Commission stated (at page 189 of its decision):

> "In addition, under the tariffs of the line-haul carriers, the packers, including complainant, may, if they choose, specify delivery of direct shipments on industry tracks serving their plants, by paying the published switching charges in addition to the line-haul rate."

The record shows that appellants' industrial side tracks, like the railroad team tracks, are not equipped for unloading live stock. Mr. M. J. Barron, at pages 763, 764 of the record, testified in substance as follows:

> Exhibit 92 is a map showing the tracks adjacent to the Swift plant in the Union Stock Yards district. Upon this map are legends for each loading or unloading dock and the purpose for which it is used. I have made a personal inspection of all the tracks noted.

on this map since it was prepared. There are no facilities by way of pens or chutes for the unloading of live stock on any of the industry tracks serving the plants of Swift and Company in the stock yards district.

IN ADDITION, FOR DELIVERY OF LIVE STOCK UPON APPELLANTS' INDUSTRIAL SIDE TRACKS, APPELLANTS WOULD BE REQUIRED TO PAY $19.50 PER CAR ABOVE THE RATE TO CHICAGO, OR TO THE UNION STOCK YARDS.

The evidence upon this point appears at pages 762, 763 of the record and is not disputed. It shows in substance that Swift and Company is listed as an industry upon the Chicago Junction Railway and that to reach Swift's industry tracks a combination of rates would be applicable, made up of the rate to the chutes of the Union Stock Yard and Transit Company (which is one station) plus a switching charge of $19.50 per minimum carload applicable from the unloading chutes to appellants' industry tracks (which are a different station).

The Union Stock Yard and Transit Company is named in the railroad tariffs as a station of the railroads. Under these conditions appellants have an unqualified right to consign their live stock to the Union Stock Yards station of the railroads rather than to an industrial side track (not equipped with unloading facilities) which would involve an additional switching charge of $19.50 per car above the railroad line haul rate to the railroads' terminal unloading facilities at the Union Stock Yards.

Where two stations are so named, one requiring the payment of a freight rate of $19.50 per car higher than the other, the shipper is under no obligation to select the station to which the higher rate applies merely to avoid the consequences of the carrier's failure to afford a proper delivery of live stock at the only station equipped for that purpose.

IX.

The District Court Erred in Failing to Find That Appellants Cannot Be Deprived by the Railroad Defendants of a Lawful Delivery of Live Stock at Said Railroad Defendants' Live Stock Station at the Union Stock Yards in Chicago, Because Live Stock May Be Delivered at the Unloading Facilities of the Omaha Packing Company at 26th & Halsted Streets (Another and Different Station), Approximately Three Miles from Appellants' Plants at the Union Stock Yards, at Which the Railroad Defendants Do Not Maintain Their Own Facilities for Unloading Live Stock; and That Appellants Have a Right to Obtain a Lawful *Delivery of Their Live Stock at* the Facilities Provided by the Railroad Defendants at the Union Stock Yards Adjacent to Appellants' Plants, as Specified in Assignment of Error No. 26.

A specific finding to the effect indicated in this caption was requested of the District Court (par. 19 of proposed conclusions of law, R. pp. 88-89), but no such finding was made.

The proposition above stated would appear to be self-evident. The unloading facilities of the Omaha Packing Company are private facilities owned by that company, located about three and a half miles distant from appellants' plants in the stock yards area (R. p. 255). When live stock is delivered at the pens of the Omaha Packing Company plant it must be moved from those unloading pens by truck to the plant of appellant Swift and Company at the stock yards. The record shows that the average cost of such trucking is 3.5 cents per head on hogs, 15 cents per head on cattle, 3.5 cents per head on calves, and 1.75 cents per head on sheep (R. p. 370).

Appellants cannot be denied the right to ship their live stock to the station provided by the railroads as their live stock terminal and there receive the service required by law. The unloading facilities at the Omaha plant are private tracks and pens. That industry is shown as a separate station in the railroad tariffs. The only place

where the railroads maintain facilities or their own are at the Union Stock Yards. Appellants have a right to demand the use of *railroad* facilities. Appellants have an unqualified right to consign their live stock to the railroad station most convenient to their plants, designated as a live stock terminal by the railroads, and that station or terminal is at the Union Stock Yards.

If the statement appearing in the Commission's decision, which is the last sentence in the first paragraph on page 189 (R. p. 46), were enlarged to correspond with the undisputed evidence, it would read as follows (our own interpolations being indicated in italics):

> "More than one-third of the direct shipments of live stock arriving at Chicago, *being the 10,000 cars of direct shipments by complainant to the unloading facilities of the Omaha Packing Company*, are unloaded at points other than the Union Stock Yards; *that is to say, at the private unloading facilities of the Omaha Packing Company, three miles from the Union Stock Yards district; and in order to bring such shipments to their desired destination complainant must pay for trucking at a cost of approximately $3.75 per car on cattle and must maintain its own unloading facilities and unload the live stock at its own expense.* It appears, therefore, that direct shipments of live stock are unloaded at the Union Stock Yards only when complainant elects to take delivery there."

This record and the decisions of the Commission herein cited show that the railroads have no facilities of their own properly equipped for the unloading of live stock except the pens and chutes at the Union Stock Yards. It is submitted that appellants have a right to obtain a lawful transportation service in connection with the delivery of their live stock to the specific station which the railroads have named as their live stock terminal.

X.

The Commission Erred in Giving Weight to An Alleged Interpretation of Section 15 (5) by the Actions of the Packers, the Producers, the Yard Company, and the Railroads.

The Commission's decision as to its lack of jurisdiction and its construction to the effect that section 15 (5) superseded section 1 (3) apparently is based in part upon that portion of its decision commencing with the first paragraph on page 196 (R. pp. 54-55) in which the Commission states that the construction now adopted by it is "the interpretation placed upon the amendment since its enactment by the actions of the packers, including complainant and intervener, of the producers, of the Yard Company, and of the railroads". But the courts have repeatedly held to the contrary, since the enactment, as indicated in the decisions quoted at pages 15-21 herein.

THE COMMISSION ERRONEOUSLY FAILED TO FIND THAT A CONTRARY CONSTRUCTION HAS BEEN PLACED UPON THE STATUTE AT MANY OTHER POINTS.

It was alleged in paragraph 20 of the complaint in the District Court (R. pp. 14-15) that the Commission erred in failing to include in its report any reference to evidence offered by appellants which shows that delivery of direct shipments of live stock to the consignee, without charge in excess of the published tariff rate, where stock yard services are not required or requested by the consignee, is provided at many important stock yards which are served by the railroad defendants; and in failing to find that in one instance of this kind (*Allied Packers case, infra*) the practice was prescribed by the Commission and in another instance (*Kahn case, infra*) is in accordance with a finding of the Commission. The evidence upon this point appears

in full at pages 189-206 of the record in this court. It is summarized at pages 92-100 of the appendix to the brief. It shows that egress, without a stock yard service and without an addition to the line haul rate, is permitted without charge at the following stock yards:

Union Stock Yards Company of Baltimore, Md.
Buffalo Stock Yards, East Buffalo, N. Y.
Cincinnati Union Stock Yards, Cincinnati, Ohio.
Cleveland Union Stock Yards, Cleveland, Ohio.
Detroit Stock Yards, Detroit, Mich.
Indianapolis Stock Yards, Indianapolis, Ind.
Los Angeles Union Stock Yards Company, Los Angeles, Calif.
Bourbon Stock Yards, Louisville, Ky.
Muncie National Stock Yards, Muncie, Ind.
West Philadelphia Stock Yards Company, Philadelphia, Pa.
Pittsburgh Joint Stock Yards, Pittsburgh, Pa.
Wichita Union Stock Yards Company, Wichita, Kans.

The recent decision of the Commission in *Status of Public Stockyard Companies*, 245 I. C. C. 241 (April 7, 1941), shows the same condition existing at certain stock yards not mentioned in the evidence in this case. The Commission there points out that the Jersey City Stock Yards Company operates a *public* stock yard in Jersey City, N. J., and states, at page 259:

"The stockyard company also notifies consignees of arrival of shipments, preserves the identity of each consignment, *delivers stock to consignee* or on floating equipment, obtains receipts therefor, collects transportation charges, handles loss and damage claims, assumes all responsibility therefor, weighs stock if requested, and performs all clerical work in connection with such services. It also orders cars, checks weights, routes shipments, and prepares freight bills on prepaid shipments. For these services the railroads pay the stockyard company $2.75 per car, except on outbound shipments. This charge is published in tariffs on file with us."

This practice was not disapproved by the Commission in said decision.

The same decision of the Commission shows that a similar practice obtains in connection with the West Philadelphia Stock Yard Company which operates the only public stock yards at Philadelphia, Pa. (p. 250) and the Union Stock Yard & Market Company, Inc., which operates the only public stock yards in New York, N. Y. (p. 268).

This evidence should be sufficient to show that there has been no settled interpretation with respect to egress by the packers, the railroads, or the stock yards. Furthermore the Commission itself required egress without additional charge in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641; stated that the shipper was entitled to such a delivery in *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705; and construed the law as requiring egress without payment of yardage charges in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553.

Very clearly the evidence to which reference has been made, as well as the decisions cited, shows that there has been no settled interpretation of this point by the packers, producers, stock yard companies, or the railroads.

XI.

The District Court Erred in Failing to Find That the Contract of July 1, 1891 (Which Expired in 1906) Created No Tri-Party Relation Between the Stock Yards, the Railroads, and Appellants; That the Railroad Defendants Were Not Parties to Said Contract; That Said Contract Related Solely to Stock Yard Services; That the Question of Mere Egress from Railroad Unloading Pens to a Public Street Was Not Involved in Said Contract; That Said Contract Throws No Light Upon Whether Section 15 (5) of the Interstate Commerce Act Amended Section 1 (3) of That Act or the Law of the Covington Case; That Appellants Are Not Estopped to Obtain the Relief Sought in This Proceeding by Reason of Said Contract; and That, If the Union Stock Yard and Transit Company Was Ever the Agent of Appellants for the Receipt from the Railroads of Appellants' Shipments of Live Stock to Chicago, That Agency Was Ended by Appellants' Notices to the Railroad Defendants of May 9, 1933, May 16, 1933, and September 9, 1935, as Specified in Assignments of Error Nos. 20, 21, and 22.

Reference is here made to that portion of the decision of the Commission (R. pp. 41-45) commencing with the first paragraph on page 185 and continuing through the second paragraph on page 188.

A finding by the District Court in conformity with the language used in this caption was specifically requested (R. pp. 86, 87, proposed findings Nos. 13, 14, 15), but none was made.

Entirely aside from the law of the case, the Commission here finds a ground for dismissal of the complaint because of a certain contract between appellant (Swift and Company) and others and the Chicago Junction Railways and Union Stock Yards Company, effective as of July 1, 1891, which expired July 1, 1906. The origin of the controversy which led to the contract is somewhat vague. Whatever it may have been, it appears that certain packing companies in Chicago acquired property known as the Central Stock Yards, near the property of the present stock yard company, for the purpose of establishing a stock yards of their

own. They were, however, unable to obtain delivery of live stock at the Central Stock Yards because the Chicago Junction Railways, owned by the Union Stock Yards Company, which then considered itself a purely local carrier not subject to the *Interstate Commerce Act*, and which was the only railroad reaching either the Union Stock Yards or Central Stock Yards, refused to deliver live stock to the Central Stock Yards.

Suits had been commenced in the Chicago courts for the purpose of requiring the Chicago Junction Railways to make such delivery. See exhibits 49-58, inclusive. The dispute was compromised by the contracts which are in evidence as exhibits 47 and 48.

Exhibit 47, printed at page 101 of the appendix to this brief, is the contract then made between the Chicago Junction Railways and Union Stock Yards Company and the Armour, Morris, and Swift interests.

Exhibit 48 is a similar contract made at the same time between the Chicago Junction Railways and Union Stock Yards Company and twelve smaller packing concerns then operating at or near the Union Stock Yards.

In substance those contracts provided that the Union Stock Yards Company would purchase part of the tract of land in Indiana theretofore acquired by certain packers and the property known as the Central Stock Yards in Chicago; that the Union Stock Yards Company issue to the packers named in exhibits 47 and 48 certain income bonds, dated July 1, 1891 and payable as to principal on or before July 1, 1907, with interest payable semi-annually each year. The packers parties to the contract agreed on their part, *for the term of fifteen years*, to bring all of their live stock to the Union Stock Yards and to "use the said yards, and pay the usual yardage charges therefor." *The contract related solely to stock yard services.* The packers also agreed that, so

long as the stock yards company should conduct the business of a general stock yards in Chicago, the packers would not "establish or carry on, directly or indirectly, or be concerned or interested in any manner or form whatsoever in any stock yards in said city for the receipt and use of their own live stock."

Appellants contend that the Commission erred in giving any weight to these ancient contracts, principally for the following reasons:

1. At the effective date of the contracts described in the decision (July 1, 1891) conditions, including statutory provisions, were so different that it is not clear that appellants' predecessors had any remedy for their grievances other than to move their plants from the Union Stock Yards or to enter into the compromise contract.

2. The Commission attempts to apply the doctrine of estoppel based upon a contract made in 1891 and which expired in 1906, but the doctrine is not applicable under the circumstances of this case or under the statutes involved.

ERROR IN FINDING IN COMMISSION'S REPORT.

The Commission states (decision, p. 188, R. p. 45):

> "* * * the packers continued to pay the yardage charges, guaranteed the earnings therefrom for a limited period, *and guaranteed for an unlimited period never to receive livestock in Chicago other than at the Union Stock Yards.*"

The error of the Commission in this finding is apparent from paragraph Eighth of exhibit 47 (appendix to brief, p. 110). The agreement of the packing companies was not for an unlimited period never to receive live stock in Chicago other than at the Union Stock Yards, but, on the contrary, was not to "establish or carry on, directly or indirectly, or be concerned or interested in any manner or form whatsoever, in any stock yards in said city for the

receipt and use of their own live stock." The Commission's error is self-evident.

DISTINCTION BETWEEN STOCK YARD SERVICE COVERED BY THE CONTRACT AND EGRESS FROM RAILROAD CARS.

We hope that the court will not confuse the question of *yardage charges for stock yard services*, the sole matter with which the contracts were concerned, with the question of *mere egress from a railroad unloading pen to a public street*. The yardage charge referred to in the contracts was for stock yard services. It includes the service by the stock yards, while it has custody of the live stock, of at least the following items.

1. Furnishing by the stock yards of facilities for receiving, buying, or selling live stock on a commission basis;
2. Feeding;
3. Watering;
4. Holding;
5. Delivery to a purchaser or to an outbound railroad.
6. Weighing; and
7. Handling.

It goes without saying that, if appellants desire a stock yard service, they must pay the stock yard charge in the tariff filed with the Secretary of Agriculture, just as they paid the stock yard charges prior to the enactment of the *Packers and Stockyards Act, 1921*. It is a fact, and necessarily so, that the railroads, to quote the Commission's decision (p. 188, R. p. 45), "have no voice in the nature of the yards services provided or in the manner in which they are performed." Under the conditions contemplated in the 1891 contract, and followed for fifteen years as a result of that contract, the packers who were parties to the contract were obtaining separately two distinct services, *one service from the railroad* in transporting live stock to the property of the yard company and *another service from the yard*

company, strictly a stock yard service, of caring for and providing storage for animals until appellants were ready to take them into their packing plants. The question of a *mere egress* to the street was not the subject of the 1891 or of any other contract, arrangement, or agreement.

What did happen after the lapse of many years after expiration of the 1891 contract in 1906 was that appellants demanded, *not from the yard company*, but *from the railroads*, egress from the railroad unloading pens to a public street.

Prior to 1933 appellants were not prepared to make such a demand. One of the reasons was that they did not have their own scales for weighing the live stock, and weighing was one of the *stock yard* services described in the stock yard tariff. This matter of weighing was the controlling question in *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705. The Commission there said (p. 706):

> "No additional charge is made if the livestock is removed by consignees from the unloading pens before it is *weighed*, but when it is taken from the unloading pens, is *weighed*, and is placed in the holding pens, the yardage charges here assailed are made regardless of the length of time the holding pens are occupied."

The Commission also held that the complainant was entitled to obtain his live stock from the railroad unloading pens at the stock yards without any additional charge provided he did not require stock yard services. Inasmuch as the shipper in the *Kahn case* did request stock yard services, such as have been described above at Chicago, but could obtain his live stock without any such charge if he did not request stock yard services, the Commission held that he had no just ground for complaint.

The decision in the *Kahn case* was made April 10, 1933. Inasmuch as appellants did not at that time have their own weighing facilities, under that decision they were not

in position to discontinue the stock yard services theretofore provided by the stock yard company. Immediately thereafter appellants proceeded to install their own weighing facilities. The Commission has so found (decision, p. 184, R. p. 41):

> "It has not been weighed on scales of the Yard Company since 1933, when complainant installed scales tested and supervised by the Western Weighing and Inspection Bureau, an agency of defendants, on its own property where the weighing is done by complainant's employees."

Having changed their facilities so as to come within the decision of the Commission in the *Kahn case* (192 I. C. C. 705) appellants made their demand for egress and this was the first time in their history that they were able to do so.

It should be noted that the long history of former transactions, stated at pages 185-187 of the Commission's decision (R. pp. 41-45), *does not relate to a demand for egress from railroad cars.*

The compromise reached between the packers and the stock yard company (at that time owner not only of the stock yards but also of the Chicago Junction) amounted in substance to an understanding that appellants and the other packers, large and small, would for a period of fifteen years bring their shipments into the Union Stock Yards, use and pay for its stock yard service.

IF THE UNION STOCK YARD AND TRANSIT COMPANY WAS EVER THE AGENT OF APPELLANTS FOR THE DELIVERY OF LIVE STOCK, THAT AGENCY WAS DEFINITELY ENDED BY THE NOTICES OF APPELLANT (SWIFT AND COMPANY) TO THE RAILROAD DEFENDANTS IN 1933.

The protests lodged with the railroad defendants against the collection of yardage charges for mere egress are set forth at length in exhibit 2 and at pages 59-74 of the appendix to this brief. If over a period of years appellants

had constituted the Union Stock Yard and Transit Company their agent to accept delivery of their live stock from the railroad defendants, those protests put the railroad defendants upon notice that such agency of the stock yard company to receive appellants' shipments, and furnish a stock yard service in connection therewith, was ended. Attention is called specifically to the paragraph in appellant's (Swift and Company) letters of May 16, 1933, to the various line haul carriers reaching Chicago, reading as follows:

> "You are hereby notified that on and after May 25, 1933, the Union Stock Yard & Transit Company of Chicago, Illinois, has no authority, *after unloading such livestock as your agent*, in accordance with its tariff, to thereafter accept, or receipt for such live stock for us, *as our agent, for our account, or in our name*. On and after May 25, 1933, any delivery by your railroad of our live stock to the Union Stock Yard & Transit Company of Chicago, Illinois (other than delivery of such live stock to the Union Stock Yard & Transit Company of Chicago, Illinois, *as your agent for unloading and delivery to us*) will constitute a conversion of our property. Any payment by us of yardage or other charges to the Union Stock Yard & Transit Company of Chicago, Illinois, made to gain possession of such property on and after said date, will be under protest, will be for your account and will be made purely in mitigation of damages."

Shortly prior to this notice to the railroads the Commission had made the following finding in its decision in *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705, 709 (April 10, 1933):

> "The shipping public is entitled to reasonably convenient and safe chutes, pens, and ways for discharging livestock from the cars, and *taking them from the carriers' premises without a yardage charge. Not until the livestock can be so removed does the line-haul transportation cease.*"

The foregoing notice to the railroads was based upon said decision of the Commission. Unless appellants are forever estopped from obtaining the live stock delivery required by the statutes and decisions of the courts, this notice was adequate to end any agency on the part of the Union Stock Yard and Transit Company and to advise the railroad defendants that they would be required to conform to their lawful obligations in connection with the shipments here involved.

THE COMMISSION ERRED AS A MATTER OF LAW IN ITS APPLICATION OF THE DOCTRINE OF ESTOPPEL.

The Commission erred as a matter of law in adopting the doctrine of estoppel based upon the 1891-1906 contract. Where the action sounds in tort as it does in this case (see *Adams* v. *Mills*, 286 U. S. 397, 76 L. ed. 1184) the party is never estopped from claiming damages for a tort simply because he waived his claim as to previous similar torts. It is now thirty-five years since the *expiration* of this contract. If ancient agreements prevented remedial action by the Commission, regardless of changed conditions, the Commission could have made few orders changing rates, prohibiting unfair practices, or eliminating undue prejudice, because in practically every case it could have been made to appear that the violation of law was long continued, or for a certain period was agreed upon by the interested parties. The decisions of this court squarely deny the doctrine of estoppel as applied to the right of a shipper or receiver of freight to obtain compliance with the provisions of the statute merely because a practice has long continued in effect.

In *Interstate Com. Com.* v. *Atchison, T. & S. F. R. Co.*, 234 U. S. 294, 58 L. ed. 1319, one of the defenses urged by the carriers against the order of the Commission was that the team track switching charge had been maintained

for a number of years and was therefore reasonable. The court in answer to this contention stated (p. 313):

> "The service, however, was performed subject to the law of the land requiring that the carrier's charges should not be unreasonable or unjustly discriminatory. * * * If it became apparent that the shippers were subjected to an arbitrary and unwarranted exaction, *they were in no way estopped from bringing the matter before the body created by law to deal with such questions, and from securing its order directing the carriers to stop the objectionable practice.*"

Dealing with a somewhat similar contention of the carriers in *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 75 L. ed. 672, at page 759, the court said:

> "Long-continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed. *A failure to enforce the law does not change it.*"

To the same effect is the decision of the Supreme Court in *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 75 L. ed. 1227, where the court said at page 511:

> "Where a forbidden discrimination is made, *the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity.*"

IN FAIRNESS THE COMMISSION SHOULD HAVE CONTINUED THE FACTUAL HISTORY TO DATE, IN ORDER TO SHOW THE CHANGED CONDITIONS AS TO THE STOCK YARDS OWNERSHIP.

The Commission merely sets forth certain evidence concerning contracts made by appellant (Swift and Company) and certain other packers, effective as of *July 1, 1891*, and certain evidence presented before the Federal Trade Commission and summarized by it in its *twenty-three year old report*, dated June 28, 1919. So far as appellants' owner-

ship of or interest in public stock yards is concerned, it would have been only fair for the Commission, having commenced the story, to have finished it, to the extent that it was shown in evidence. This evidence may be briefly summarized as follows:

The Supreme Court of the District of Columbia entered a consent decree on February 27, 1920, that is, in the year following the Federal Trade Commission report, which enjoined the defendants there named (including Swift and Company) from owning any interest in any public stock yard company and contained certain provisions as to the time and manner within which the owners of such stock yard interests should divest themselves of such ownership. The Consent Decree is lengthy. A certified copy of the entire decree was offered in evidence before the Commission as exhibit 62.

Exhibit 74 is a copy of a petition of the Swift defendants to the court, setting forth their stock ownership and proposing a plan under which the stock should be deposited with a trustee to be named by the court.

Exhibit 75 is an order of the court approving the plan for disposition of the stock yards set forth in exhibit 74.

Exhibit 76 is a farther order dealing with the powers of the trustee of the stock, etc.

Exhibit 77 is an order of the court approving the sale of the Swift and Company stock, then held by Harry S. New as trustee, to United Stock Yards Corporation. The order itself shows that it was approved by the Department of Justice.

Exhibit 71 is a prospectus issued by the United Stock Yards Corporation, showing the purchase by it of the shares of capital stock in various stock yards theretofore owned by Swift and Company or its nominees or trustees.

NO SWIFT INTEREST IN UNION STOCK YARDS.

It would also have been only fair on the part of the Commission to state, in accordance with the undisputed evidence, that Swift and Company had no direct or indirect financial interest in The Union Stock Yard and Transit Company of Chicago after the expiration of the fifteen-year contract, effective as of July 1, 1891 (R. pp. 723-729).

In this connection it should be remarked that the contract of July 1, 1891 throws no light upon the question whether section 15 (5) amended the law of the *Covington case* and section 1 (3) of the *Interstate Commerce Act.*

THE CONTRACT OF 1891 CREATED NO TRI-PARTY RELATION BETWEEN THE STOCK YARD COMPANY, THE RAILROAD DEFENDANTS, AND APPELLANTS.

In considering the 1891-1906 contract, to which the Commission apparently gives controlling weight, we ask the court to keep in mind the following facts:

There was no "tri-party relation" as indicated by the Circuit Court of Appeals in *Armour & Co.* v. *Alton R. Co.*, 111 F. (2d) 913, 918. The Commission emphasizes the fact that the railroad companies were not parties to the agreement and that the packers deemed the question of yardage charges not to be an unreasonable practice *on the part of the railroad companies* and to be a matter in which the railroads were not in any way concerned.

The Commission simply fails to note the difference between (1) a yardage service furnished by a stock yard at the request of appellants and (2) egress from the carriers' unloading pens. The yardage charge was and is for a stock yard service of holding, watering, feeding, weighing, etc. Naturally the railroads did not and could not have any interest in the collection of a *yardage* charge for

stock yard services, nor could they then or now be required to pay a *yardage* charge for stock yard services.

With such a service the railroads were not then and are not now concerned. If at the present time appellants should desire a *stock yard* service, they certainly could not expect the railroads to pay for it. In view of the fact that *stock yard services* only were involved in the contract, it is evident why the railroads were not interested therein nor a party to the contract.

The only "relation" was one established for fifteen years between certain small and large packers and the stock yard company. The *railroad* defendants in this case were not parties to that contract, and it cannot have any effect upon the *railroad duty* to afford egress for shipments of live stock from the *railroad* unloading pens. The duty of a railroad to deliver freight is a matter of common law and statutory provisions, not a matter of private contract.

Stock yard services, which were the only subject matter of the 1891-1906 contract, are something entirely different and, so far as regulation goes, since 1921 have been subject to a different statute, under the jurisdiction of the Secretary of Agriculture.

CONCLUSION WITH RESPECT TO CONTRACT OF 1891.

The decision of the Commission (third paragraph, p. 185, R. p. 42) shows that counsel for appellants objected to the receipt of the evidence here involved; thereafter moved that the evidence be stricken; and that the Commission overruled these motions.

The ground for these motions was that the evidence is all immaterial because the present rights of appellants cannot be determined by transactions which took place fifty years ago, prior to the present laws regulating railroads

, and stock yards, such as the *Elkins Act* of 1903, the *Hepburn Act* of 1906, the *Transportation Act* of 1920, and the *Packers and Stockyards Act, 1921.*

The prayer of the complaint was that the Commission issue an order under which appellants "may obtain delivery to them by defendants of said direct shipments at reasonably convenient, safe, and suitable chutes, pens, and ways, and be permitted egress for removal from said unloading pens of such live stock to the nearest public street, via the shortest or most convenient way, to be designated by defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yard and Transit Company of Chicago" (R. p. 33).

If this is a right possessed by appellants, it is a right conferred by law and cannot be denied upon the theory of estoppel under a contract of 1891. It does not depend upon voluntary transactions of appellants or the Yard Company in 1891 or 1892. *Likewise, if it is a lawful right, it is a right not only of these appellants but of any receiver of direct shipments of live stock at Chicago and, for that matter, at any point in the United States.* The conclusion of the Commission would determine a general rule applicable throughout the entire United States as to all receivers of live stock because of a contract between specified private parties effective only from 1891 to 1906 at a single stock yard. For this reason, the immateriality of this evidence and of the findings by the Commission are obvious.

XII.

The District Court Erred in Failing to Find That the Issues in the Present Case Are Not the Same as Those Which Were Before the Interstate Commerce Commission in Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co., 195 I. C. C. 553, Which Was Reviewed by This Court in Atchison, T. & S. F. R. Co. v. United States, 295 U. S. 193, 79 L. Ed. 1382, as Specified in Assignment of Error No. 18.

A specific finding by the District Court in accordance with the caption of this chapter was requested by appellants (R. p. 84), but none was made.

Appellants assert that the Commission erred in the findings set forth in paragraph 15 of the complaint in the District Court (R. pp. 10-12), which are taken from pages 181, 189-190, 191, and 196 of the Commission's decision (R. pp. 36, 46-47, and 54, 55). The gist of the Commission's findings is expressed in the following sentence (p. 196):

> "There is no difference in principle between the issue in the *Hygrade case* and the issue in this proceeding."

The decision referred to by the Commission is *Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553. The Commission's order in that case was set aside by this court in *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193, 79 L. ed. 1382. The parts of the Commission's decision quoted in paragraph 15 of the complaint in the District Court (R. pp. 10-12) hold in substance that the issues in this case and in the *Hygrade case* are identical; that the alleged difference is not one of substance; and that, upon authority of the decision of this court in the *Atchison case*, the complaint must be dismissed.

Appellants contend that the issues in this case are so essentially different from those in the *Hygrade case* that

the decision in the *Atchison case* did not justify dismissal by the Commission of appellants' complaint.

Here again it may be noted that this court, in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198, at page 219, cites the decision in the *Atchison case* as sustaining the doctrine of the *Covington case*, under the terms of the *Interstate Commerce Act*, including section 15 (5). In contrast, the Commission holds that the same decision (*Atchison case*) abolishes the rule of law as to delivery of live stock stated in the *Covington case*.

THE ISSUES ARE DIFFERENT.

The issues in the *Hygrade case* are stated by this court as follows (295 U. S. 193, 200, 79 L. ed. 1382, 1389):

> "The Hygrade Company did not seek and the Commission did not grant relief *upon the ground that the carriers failed to provide egress from the unloading pens in the public stockyards to the city streets by means of which consignee's animals might be removed to its plant.* * * * Consignee also sought free use of the Yard Company's properties including the overhead runway to take its animals from holding pens *as well as from unloading pens to its plant.*"

Contrasted with these issues in the *Hygrade case*, as stated by this court, the prayer of the complaint to the Commission (R. p. 33) is that complainants "*be permitted egress for removal from said unloading pens of such live stock to the nearest public street, via the shortest or most convenient way, to be designated by defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yards and Transit Company of Chicago, and without payment of any charges other than the lawful transportation charges.*"

"Our contention is sustained by the Circuit Court of Appeals for the seventh circuit."

After stating the issues, this court added (p. 201):

> "Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways."

In the present case appellants are not seeking a route over the property of the stockyard company, to their plant, but merely an egress to the street. Appellants are here asking only the relief which this court indicated was *not* sought by Hygrade and are clearly within the exceptions stated in the decision.

The decision of this court in the *Atchison case* was limited strictly to the shipments there involved. It *did not deny the Commission the right to make an appropriate*

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* In the recent decision of the Circuit Court of Appeals in *Armour & Co. v. Alton R. Co.*, 111 F. (2d) 913, 916, the court said:

> "However, the Commission's order directing discontinuance of the yardage fee in instances where delivery was taken at the unloading pens, was set aside. *Hygrade case, supra*, 295 U. S. 193, 55 S. Ct. 748, 79 L. ed. 1382. The Court was impressed by the consignee's constant use of certain property of the Yards Company, namely, 'A route via the overhead runway to the Hygrade plant,' and concluded that there was no evidence that in removing the animals from the unloading pens, the consignee used only an egress to the city streets. However the Court recognized that 'Plainly there is an essential difference between the route from the unloading pens to consignee's plant and a mere way out to the public highways.'
>
> "In this connection, it is material to quote briefly: 'The Hygrade Company did not seek and the Commission did not grant relief upon the ground that the carriers failed to provide egress from the unloading pens in the public stockyards (at Chicago) to the city streets by means of which consignee's animals might be removed to its plant. * * * Consignee * * * sought free use of the Yards Company's properties, including the overhead runway * * *.' *Atchison Ry. case, supra*, 295 U. S. at page 200, 55 S. Ct. at page 752, 79 L. Ed. 1382. *It is to be noted that in the instant case plaintiff has borne these words in mind.*
>
> "In a recent opinion the Supreme Court said of the Atchison or Hygrade decision that 'There the Commission's order * * * was set aside on the sole ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish.' *Union Stock Yard & Transit Co. v. United States*, 308 U. S. 213, 60 S. Ct. 193, 196, 84 L. ed. 198."

To appropriate the words of the Circuit Court of Appeals, in the instant case before the Commission "plaintiff has borne these words in mind". Appellants have not asked for the use of viaducts, runways, scales, and a tunnel, but only for egress to the street.

order, but reversed the decision solely and finally because the Commission had not made definite and specific findings of fact.

We now have the benefit of the construction placed by this court itself upon its own decision in the *Atchison case*. This is in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198, where the court said (p. 219):

> "That appellant's stockyard is a terminal of the line-haul carriers, and that it performs their railroad terminal services within the meaning of the Act was recognized in *Adams* v. *Mills*, *supra* (286 U. S. 409, 76 L. ed. 1192, 52 S. Ct. 589) and also in *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382, 55 S. Ct. 748, *supra* (*Hygrade case*). There the Commission's order directing the discontinuance of appellant's yardage charge to consignees was set aside on the *sole* ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish."

It is respectfully submitted that the issues, as presented by the pleadings and evidence in the present case, are substantially different from those in the *Hygrade case*. It is also apparent that the order in the *Hygrade case was reversed because of the lack of adequate and definite findings by the Commission*. This court in no way closed the door to relief by the Commission upon proper issues.

FACTUAL DIFFERENCES BETWEEN PRESENT CASE AND HYGRADE CASE.

The Commission not only finds that the issues are not different from those in the *Hygrade case* but also states that factually there is no substantial difference. The Commission says (p. 191 of decision, R. p. 48):

> "The evidence here conclusively shows that there is no essential difference between the routes and the

services required from the unloading pens to plants outside the stock yards and a way out to the public highways. In either case, property of the yard company must be used."

In this statement the Commission is plainly in error. We turn to the decision of this court for a statement of the facts in the *Hygrade case*. Referring to the shipments of which the Hygrade Company had taken possession at the unloading pens this court said (p. 196):

> "The others are by it taken from the unloading pens and *driven through ways or alleys within the extensive yards properties over scales, where for the purpose of computing freight charges they are weighed*, to and along *an elevated runway* over pens in the yards and the tracks of the Junction Railway, *thence to and through a tunnel, under the proposed extension of Pershing Road* (located along what was formerly a part of the Chicago River) *ending at the Hygrade Company's plant which abuts on that highway.*"

It should be noted that in the present case, and the Commission so finds, there is no necessity for taking the live stock from the unloading pens and driving it "through ways or alleys within the extensive yard properties *over scales.*" Likewise, since no route of egress was suggested by the railroad defendants, there is no evidence to support a finding as to what facilities would be necessary, if the route most convenient to the railroads were used. The Commission squarely contradicts its own finding by the following finding (p. 184 of decision, R. pp. 40, 41):

> "All of such shipments have been purchased at points other than Chicago for shipment to Chicago for immediate slaughter. The livestock comprising such shipments is not fed or watered in the yards. *It has not been weighed on scales of the Yard Company since 1933, when complainant installed scales tested and supervised by the Western Weighing and Inspection Bureau*, an agency of defendants, on its own property where the weighing is done by complainant's employees. *Complainant does not request or desire that*

any of its direct shipments be held or placed in holding pens. It is prepared to have crews of men ready at any hour of the day or night to move its stock from the unloading pens.

"Complainant demands that defendants accord it the right to take possession of the animals at the unloading pens immediately after they are placed in such pens, and to remove them immediately from such pens through the property of the Yard Company to the nearest public street free from the payment of a yardage charge."

Certainly this is a substantial factual difference between what is sought by appellants in this case and what was sought by complainant in the Hygrade case, as is shown by the decision of this court and the finding of the Commission.

In the *Atchison (Hygrade) case* this court said "Transportation does not include delivery within the Hygrade plant" (295 U. S. 193, 201, 79 L. ed. 1382, 1389). The court also pointed out in the quotation from its decision on page 80 that the delivery there sought involved the use of a tunnel "under the proposed extension of Pershing Road (located along what was formerly a part of the Chicago River) ending at the Hygrade Company's plant which abuts on that highway."

At the time of the hearing in the present case the Hygrade plant had been closed for some time and the tunnel to the plant had been dismantled. It must be obvious that appellants could not and would not use a tunnel running into the basement of the Hygrade plant in order to reach a public street nor has any such delivery been sought.

POSSIBLE MEANS OF EGRESS.

In this connection reference should be had to the maps which are exhibits 1 and 20 and to the testimony before the Commission. Egress from the unloading pens to Packers Avenue would involve a movement of not more

than 40 to 50 feet beyond the western end of the unloading pens over vacant ground and would not require the use of any viaducts, runways, or tunnels (R. p. 363).

Again, if the court will examine the same maps and pages 372-375 of the transcript (R. pp. 357-359), it will find that an egress to a street is available from the *east end of the unloading pens by merely crossing a bridge over Halsted Street.* After crossing this bridge the live stock will come out on a public alley by which it can be moved to appellants' property. *This would involve no use of the stock yard facilities to the east of the unloading pens.*

To summarize, this court held that the Hygrade Food Products Corporation was using *ways and alleys within the extensive yard properties to scales* where the live stock was weighed, to and along an elevated runway over pens in the yards and tracks of the Junction Railway, *thence to and through a tunnel owned by the stock yard company which ended at the Hygrade plant.*

There is no better way of showing railroad delivery than to prove that the consignee, at a given time and place, took possession of and *thereafter* entirely dominated and controlled the movement of the property (as did the Hygrade Food Products Corporation) selecting the route to be followed, using the stock yard scales, etc.

This is what Hygrade did and what appellants have *not* sought in their notices to the carriers in 1933, 1935 or in their complaint.

THE COMMISSION ERRED IN ITS CONSTRUCTION OF THIS COURT'S DECISION CONCERNING EGRESS AT PUBLIC STOCK YARDS.

In appellants' brief before the Commission they referred to the following language of this court in the *Atchison case* (p. 201):

"Plainly there is an essential difference between the

route from unloading pens to consignee's plant and a mere way out to the public highways."

The Commission comments upon this reference as follows (decision, p. 191, R. p. 48):

"In the statement referred to by complainant, the court was contrasting the situation *at public stock yards* with the situation at live stock terminals *other than public stock yards*, and it did not draw a contrast between a route through public yards to a street and thence to a packing plant with a route through public yards to the street."

There is nothing in the sentence quoted from this court's decision to indicate that the court was contrasting the situation at a *public stock yards* with the situation at a *private stock yards*.

Furthermore since the decision in the *Hygrade (Atchison) case* the court has clarified that decision and placed its own construction upon the language used. We refer to that portion of the decision in *Union Stock Yard & T. Co. v. United States*, 308 U. S. 213, 84 L. ed. 198, 205, quoted at pages 16-18 herein, where the court held that the law in the *Covington Stock Yards case* (139 U. S. 128, 35 L. ed. 73) is still the law of the land *as applied to a delivery at the Chicago public stock yards*. The same conclusion was also reached by the Circuit Court of Appeals in *Armour & Co. v. Alton R. Co.*, 111 F. (2d) 913. (See portion of said decision quoted at pages 19-21 herein.)

It is respectfully submitted that the Commission and the District Court erred in finding that there is no difference between the issues in the *Hygrade case* and the issues in this proceeding; and that there are no substantial factual differences.

XIII.

The Decision in Armour & Co. v. Alton R. Co., 312 U. S. 195, 85 L. Ed. 771, Does Not Affect the Present Case Except to Indicate That the Commission Has the Jurisdiction Which It Disclaimed.

THE ONLY POINT DECIDED IN THE ARMOUR CASE WAS THE QUESTION OF PRIMARY JURISDICTION.

That the only question decided by the court in the *Armour case* was that of primary jurisdiction is stated in the first paragraph of that decision where the court said (p. 196):

> "The ground on which the Circuit Court affirmed was that the issues involved presented administrative problems, necessitating primary resort to the Interstate Commerce Commission. The sole question we find it necessary to decide is whether the Circuit Court was correct in this conclusion."

The sole application of this portion of the decision to the case at bar is to establish that appellants in the case at bar initiated their complaint before the proper tribunal.

THE COURT DID NOT, IN THE ARMOUR DECISION, PLACE THE PRESENT CASE BEYOND THE CONFINES OF JUDICIAL REVIEW.

In the District Court it was contended on behalf of the railroad defendants that the court had placed the present case beyond judicial review by the following language in the *Armour decision* (p. 200):

> "*First.* At what point did the common carriers' duty to transport come to an end? Neither the statute nor any applicable principle of governing law can be said to mark this boundary, *under all circumstances and conditions and in all cases.*"

To conclude that this statement by the court placed the issues in this case beyond the scope of judicial review would be to admit that the Commission may decide non-factual

issues arbitrarily by mere administrative fiat. Properly considered, the foregoing statement by the court in the *Armour decision* is entirely correct. It is only too well settled that the duty of a carrier as to delivery may vary, dependent upon the conditions relating to the particular traffic.

1. In some cases delivery of ordinary dead freight on a carrier's team tracks is an adequate and lawful delivery.

2. In other cases delivery of ordinary dead freight upon a private side track, maintained by an industry, may be substituted for delivery on public team tracks. *Interstate Com. Com.* v. *Atchison, T. & S. F. R. Co.*, 234 U. S. 294, 58 L. ed. 1319.

3. Delivery on an interchange track, belonging to an industry having an intricate series of industry tracks serving points within its plant, may be substituted for delivery at a particular spotting point within the industry where the plant operations prevent the carrier from making a delivery in the plant at its convenience. *United States* v. *American S. & T. Plate Co.*, 301 U. S. 402, 81 L. ed. 1186.

These illustrations are perhaps sufficient to show that no single statement of law can be said to mark the boundary of the carriers' duty *under all circumstances and in all cases*. That duty may vary with the scope of the carrier's employment, the terms of the bill of lading, the facilities provided by the carrier, the nature of the commodity transported, etc.

It is not believed that the court intended to suggest that all decisions have been reversed and that the question of what constitutes a lawful delivery is now left solely to administrative caprice. No such contention was made on behalf of the United States and the Commission in the District Court.

THE DECISION IN THE ARMOUR CASE DEFINITELY SETTLES THE POINT THAT THE COMMISSION HAS, AND THEREFORE SHOULD EXERCISE, THE JURISDICTION WHICH IT DISCLAIMED IN THE PRESENT CASE.

That the Commission has, and therefore should exercise, the jurisdiction which it has disclaimed in this case would appear to be definitely settled by the following statement of this court in the *Armour decision* (pp. 200, 201):

> "*Second.* * * * If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission."

THE COMMISSION HAS JURISDICTION TO READJUST RATE SCHEDULES AND SHOULD DO SO IN A PROPER CASE.

The next reason stated by this court in the *Armour decision* for dismissing the complaint in that case without prior resort to the Commission is as follows (p. 201):

> "*Third.* * * * A court judgment in favor of petitioner would reduce the compensation of the railroads for the performance of their services, and would in effect constitute a readjustment of their rate schedules."

The plain inference is, of course, that a court may not change a railroad company's rate schedules. The Commission, however, was established by law to do that precise thing under proper conditions. As we have pointed out in earlier chapters, it would not necessarily *reduce* the carriers' rates, because a reasonable fee for egress could be added to the freight rate. There is no contention here,

nor was there before the Commission, that the railroads should provide stock yard services.

As to reparation upon past shipments, due to the damage caused appellants by failure of the railroads to afford egress, that is a matter which the Commission would have to determine, if the case is returned to it for reconsideration within the principles of law announced by this court.

THE QUESTION OF PROVISION OF ADDITIONAL TERMINAL FACILITIES BY THE RAILROAD DEFENDANTS IS NOT INVOLVED IN THE PRESENT CASE.

As the fourth ground for dismissing the Armour complaint, without prior adjudication by the Commission, this court stated (p. 201):

> "*Fourth.* If, as petitioner insists, it is the duty of the railroads to provide terminal facilities which they do not now own, possess or control, a drastic change might have to be accomplished by them. Property might have to be acquired, expensive facilities might have to be secured, and correspondingly, rates might have to be adjusted. The need for such steps raises a transportation problem of the greatest magnitude, involving many intricate considerations such as must always play a part in evaluating a claim that new depots and facilities are necessary."

No such question is involved in the present issues. The terminal facilities are those which the carriers now use under lease. It is not suggested that additional terminal facilities should be provided by the carriers or that they should acquire additional property. The sole question is whether appellants should be afforded egress through the present facilities, either at the present line haul rates or at such rates plus a reasonable additional fee for egress, if necessary.

A DECISION BY THE COMMISSION OF APPELLANTS' COMPLAINT UPON THE MERITS WOULD NOT RESULT IN ANY DISCRIMINATION AS BETWEEN SHIPPERS.

The fifth ground for dismissal of the Armour complaint was stated by this court as follows (pp. 201, 202):

> "*Fifth.* The complaint shows that there is no provision in the tariff which would authorize the railroads to make refunds to petitioner of those charges paid by petitioner to the Stock Yards Company. Such refunds, if made, would be in the nature of special allowances not authorized by the tariff. A court's adjudication of this question in this case would not uniformly benefit all shippers for whom respondents have transported livestock. Whether or not such a refund would amount to a discrimination should be determined by studies such as those the Interstate Commerce Commission is especially empowered to make."

It is, of course, the function of the Commission in a proper case to readjust rate schedules. So far as the future is concerned, if this case should be decided by the Commission in accordance with the prayer of the complaint, it would uniformly benefit alike all persons who receive direct shipments of live stock at Chicago. Whether reparation should be awarded for the past is a matter of which the Commission has exclusive primary jurisdiction. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553.

The Commission has power to establish a reasonable rate regulation or practice for the future without awarding reparation for the past. *Baer Bros. Mercantile Co.* v. *Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. ed. 1055.

THE QUESTION OF STATION AREA IS NOT INVOLVED IN THE PRESENT CASE.

The sixth ground stated by this court for dismissal of the *Armour case* without prior resort to the Commission is as follows (p. 202):

> "*Sixth.* The complaint alleges that petitioner is willing to accept delivery at any point in the station area. What the station area embraces is not defined. Whether there is property in the area on which the railroads could erect pens is not shown. To decide this issue would require a court to define the boundaries of a station named in a tariff approved by the Interstate Commerce Commission."

No such question is involved in the pending case. The station area is not in dispute. It consists only of the pens and chutes rented by the railroad defendants from the stock yard company for unloading and delivery of shipments of live stock transported to Chicago.

CLEARLY THIS COURT DID NOT INTEND TO PASS UPON THE MERITS OF THE PRESENT CASE IN THE ARMOUR DECISION.

It is apparent that this court did not decide the *Armour case* on the merits and that it did not foreclose a decision upon the merits in the present case. The present case had been decided by the Commission before the *Armour case* was argued and apparently the decision of the Commission was before the court at that time. The court carefully refrained from expressing any opinion on the merits, as witness the only reference it makes to the *Swift case* before the Commission in the *Armour decision* (p. 202):

> "The complexities of the situation here presented are graphically illustrated in the companion case of *Swift & Co.* v. *Alton R. Co.*, 238 I. C. C. 179. Swift, one of Armour's competitors, took its petition for alteration of the same long-standing practice directly to the Commission. That expert body found it a necessary

prerequisite to decision to have a trial examiner conduct extensive hearings, compiling in the process a record of 5 volumes, 1147 pages, and numerous exhibits."

Armour and Company brought its complaint in court. The District Court (27 F. Supp. 625), the Circuit Court of Appeals (111 F. (2d) 913), and this court all held that the complaint was one which must be considered initially by the Commission.

Swift and Company brought its complaint before the Commission and now asserts that the Commission decided the case upon erroneous principles of law, the principal facts being undisputed.

There is no suggestion in the decision of this court in the *Armour case* that the decision of the Commission in the *Swift case* may not be presented to the court for judicial review, or that errors of law may not be corrected. In fact the decision of this court in the *Armour case* is inferentially at least that Swift adopted the proper procedure by seeking first an administrative investigation of the facts and a ruling thereon which could be reviewed by the courts for alleged errors of law.

XIV.

The District Court Erred in Adopting as Its Own Certain Findings of the Commission and in Holding That Said Findings Were Sufficient in Law and in Fact to Sustain the Order of the Commission, as More Fully Specified in Assignments of Error Nos. 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 42.

The foregoing caption is paragraph 13 of appellants' statement of points to be relied upon.

The District Court in substance adopted as its own the various findings of the Commission, and its error in so doing was set forth in the assignments of error as indi-

cated in the foregoing caption. The errors of law alleged by appellants have been fully argued heretofore. It would be a mere repetition to present those alleged errors again under the affirmative findings made by the District Court as to which error is alleged in appellants' assignments. It should therefore be understood that this point is not waived, but specific argument is not presented under it for the reason that the controlling points have already been adequately presented.

Conclusion.

Appellants contend that this court should find that the Commission and the District Court erred in their construction of the law applicable to the facts of this case; and that the complaint should be remanded to the Commission for further procedure "within the framework of its own discretionary authority" on the correct principles as indicated by this court, in accordance with the prayer of the complaint in the District Court.

All of which is respectfully submitted.

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January 21, 1942.